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In The
Supreme Court of the United States

DANIEL and ANDREA McCLUNG,
Petitioners,

v.

CITY OF SUMNER, WASHINGTON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MALCOLM S. HARRIS
Counsel of Record
WILLIAM C. SEVERSON
999 THIRD AVENUE SUITE 3210
SEATTLE, WA 98104-4049
TELEPHONE: (206) 838-4191
FACSIMILE: (206) 838-4193

Counsel for Petitioners Daniel & Andrea McClung

March 2, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

As a condition for approving their building permit, the City of Sumner required Dan and Andrea McClung to replace a much undersized City-owned storm sewer that served their property and numerous other lots within a several block area.[1] While the McClungs' project contributed little to the need for the new larger pipe, they were nevertheless required to bear 85 percent of its cost. The McClungs ask the Court to resolve whether just compensation is due when a permit applicant is required to upgrade a public facility far beyond what is necessary to mitigate the impacts of the new development. The questions presented are:

1. When government requires a land use permit applicant to upgrade publicly-owned infrastructure facilities to legislatively prescribed standards, is just compensation due where the government fails to show that the burden of the upgrade is roughly proportional to the impacts of the new development?

2. Do the nexus and proportionality standards of *Nollan v. California Coastal Commission*, and *Dolan v. City of Tigard*, apply only to required dedications of real property, or do they equally

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[1] The first sentence of the Ninth Circuit opinion inaccurately implies that the storm water pipe at issue belongs to the McClungs: "the McClungs ... learned that *their* underground storm drain pipe did not meet the City's requirement...." (emphasis added). App. A at 4a. The pipe is not the McClungs' pipe; it is the City's pipe. That fact is uncontroverted. App. D at 52a, App. G at 59a–60a.

apply to a monetary exaction that requires the permit applicant to upgrade a public infrastructure facility?

3. Is a property owner barred from seeking just compensation because he yields under financial duress to a permit condition that effects a taking of property?

PARTIES

The petitioners, Daniel and Andrea McClung, are husband and wife.

The respondent, City of Sumner, is a municipal corporation organized under the laws of the State of Washington.

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The opinion of the Ninth Circuit Court of Appeals is reported at 548 F.3d 1219 (2008), and is reproduced as Appendix A to this petition. The district court's opinion is reported as *Tapps Brewing Inc., et al. v. City of Sumner*, 482 F. Supp. 2d 1218 (2007), and is reproduced as Appendix B.

STATEMENT OF JURISDICTION

The opinion of the Ninth Circuit Court of Appeals, as modified upon consideration of petitioners' motion for rehearing *en banc*, was filed and entered on December 1, 2008. App. A. This petition for writ of certiorari is timely filed under Rule 13.1 of the Rules of the Supreme Court. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AT ISSUE

The Fifth Amendment to the United States Constitution provides, in pertinent part, "nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

The McClungs' Property

Between 1983 and 1993, Daniel and Andrea McClung acquired four adjoining lots on the northwestern corner of Valley and Main Streets in

Sumner, Washington. Soon after they obtained title to the last one, they asked the City of Sumner to vacate the alley at the rear of the lots. The City agreed to the vacation, but retained a utility easement beneath the vacated alley for its stormwater pipe – the pipe at the heart of this dispute. App. D at 52a. The pipe serves a drainage subbasin much larger than the McClungs' property, including several blocks to the west and roughly half of the adjoining high school complex on the north.

The City of Sumner's 1992 Stormwater Comprehensive Plan and the Stormwater Regulations in Ordinance 1603

In 1992 the City of Sumner adopted a Stormwater Comprehensive Plan to address flooding problems within the city and to plan additional drainage capacity to accommodate future development. To that end, the Plan called for upgrading the City pipe behind the McClungs' lots to a 24-inch diameter pipe.

In 1993 the City enacted Ordinance 1603, which established new stormwater regulations and adopted by reference the comprehensive drainage standards of the King County Surface Water Manual. The Ordinance and Manual set minimum pipe size standards for new construction. They did not, however, directly address the question of financing upgrades to public drainage facilities. Nonetheless, the City and the Ninth Circuit interpreted the Ordinance to require developers to upgrade any public storm sewer serving a proposed development to the 12-

inch diameter minimum pipe standard set by the King County Manual.[2]

The Stormwater Upgrade Required of the McClungs

After the alley behind their lots was vacated, the McClungs proceeded with plans to convert a house on one of their lots into a Subway Shop and to pave the vacated alley for parking. The project added only a small amount of new impervious surface area. After withdrawing its initial recommendation for stormwater control measures, the City advised the McClungs that they were required instead to replace the City's existing storm sewer in the old alleyway with a new 24-inch diameter pipe to bring it up to the standard set by the 1992 Stormwater Comprehensive Plan. The new pipe increased the drainage capacity more than sixteen times.

The McClungs' project had little to do with the need for the larger stormwater pipe. Their project generated little additional stormwater, and they had never experienced flooding on their property. They had, however, witnessed periodic flooding in the adjoining school parking lot which also drained into

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[2] This interpretation of Ordinance 1603 is dubious because Sumner Municipal Code § 13.36.050 provides that the developer is only responsible for "a fair and equitable pro rata portion of specific off-site drainage improvements which become necessary due to specific new development...." Whether the Ninth Circuit correctly interpreted Ordinance 1603, however, is irrelevant to the constitutional Takings issue. Petitioners maintain that the question of whether compensation is due does not depend on whether the upgrade was legislatively authorized.

the pipe. The new pipe would cure the pre-existing deficiency of the old one and provide additional capacity for future development throughout the subbasin. As the City Engineer told the Public Works Director and City Manager, "Replacement of this pipe is needed whether McClung develops or not. The additional contribution of storm water due to the [McClung] development is small. The development creates only an additional 3800 sq. ft. of impervious area." App. F at 7a.

The City told the McClungs that (1) replacing the City's existing pipe with a new 24-inch diameter pipe was a condition of their development; (2) the McClungs were financially obligated to pay the full cost of upgrading the City pipe from 6 inches to 12 inches; and (3) the City would waive $8,000 to $8,500 in permit fees to offset the costs of upgrading the pipe from 12 inches to 24 inches. App. E at 55a–56a. The total cost of the upgrade was approximately $50,000. The net cost to the McClungs, after offsetting the fee waiver, was approximately 85 percent of the total cost.

B. PROCEDURAL HISTORY

The McClungs initiated this lawsuit in state court and first sought summary judgment on state law theories. That motion was denied, and the denial was affirmed in *Tapps Brewing, Inc. v. City of Sumner*, 106 Wn. App. 79, 84, 22 P.3d 280 (2001). On remand, the trial court refused to consider the McClungs' claim that the upgrade obligation was illegal. On a second appeal, the Washington Court of Appeals reversed that refusal and remanded for consideration of the legality of the City's stormwater pipe upgrade obligation, including whether the upgrade obligation was an

unconstitutional taking. *Tapps Brewing Co., Inc. v. City of Sumner*, (unpublished opinion reported at 125 Wn. App. 1024, 2005 WL 151932, 8, 2005 Wash. App. LEXIS 158, 3-4).

In January 2006, the City removed the case to federal court based on federal question jurisdiction over the McClungs' federal Takings claim. After the McClungs' motion to remand was denied, the case was presented on cross motions for summary judgment. The district court dismissed the McClungs' state law claims and, after determining that the McClungs' federal Takings claim was ripe, it granted summary judgment to the City on that claim, as well. App. B.

The Ninth Circuit affirmed the district court on three grounds. First, it held that requiring the McClungs to upgrade the City's pipe from 6 inches to 12 inches was a "legislative, generally applicable development condition" (App. A at 10a), not an individual land use exaction, and therefore it was not subject to *Nollan/Dolan* scrutiny. App. A at 15a. Second, as an alternative ground for that result, it held that even if the upgrade were considered an exaction it is a monetary exaction, and monetary exactions are not subject to heightened scrutiny. App. A at 16a, 17a. Finally, as to the portion of the upgrade that increased the pipe size from 12 inches to 24 inches, it held that the McClungs' claim is barred because they "voluntarily" agreed to make that

upgrade in exchange for a waiver of permit fees.[3] App. A at 22a.

REASONS FOR ALLOWANCE OF THE WRIT

The first two questions presented for review are central to much of the conflict and controversy that continue to engulf the essential nexus and rough proportionality requirements of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). There are splits of authority and a wide ranging debate among commentators on both of these issues.[4] This case

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[3] On the ripeness issue the Ninth Circuit concluded that only prudential ripeness concerns are presented, and it assumed without deciding that the McClungs' federal takings claim is ripe. App. A at 10a.

[4] The immense body of commentary addressing *Nollan* and *Dolan* continues to grow apace and to reflect widely divergent viewpoints regarding what the law is and what it should be. Some of the more recent commentary includes: Alan Romero, ENDS AND MEANS IN TAKINGS LAW AFTER *LINGLE V. CHEVRON*, 23 J. Land Use & Envtl. L. 333 (2008); Michael B. Kent, Jr.; CONSTRUING THE CANON: AN EXEGESIS OF REGULATORY TAKINGS JURISPRUDENCE AFTER *LINGLE V. CHEVRON*, 16 N.Y.U. Envtl. L.J. 63 (2008); Lauren Reznick, NOTE, THE DEATH OF *NOLLAN* AND *DOLAN*?, 87 B.U. L. Rev. 725 (2007); James E. Holloway & Donald C. Guy, THE CLIMAX OF TAKINGS JURISPRUDENCE IN THE REHNQUIST COURT ERA, 16 Penn St. Envtl. L. Rev. 115 (2007); D.S. Pensley, NOTE, REAL CITIES, IDEAL CITIES, 91 Cornell L. Rev. 699 (2006); Steven A. Haskins, CLOSING THE *DOLAN* DEAL—BRIDGING THE LEGISLATIVE - ADJUDICATIVE DIVIDE, 38 Urb. Law. 487 (2006); Carlos A. Ball & Laurie Reynolds, EXACTIONS AND BURDEN DISTRIBUTION IN TAKINGS LAW, 47 Wm. & Mary L. Rev. 1513 (2006); Jane C. Needleman, NOTE, EXACTIONS: EXPLORING EXACTLY WHEN *NOLLAN* AND *DOLAN* SHOULD BE TRIGGERED, 28

offers a clear opportunity for the Court to resolve some of that conflict and to provide needed guidance for the uniform application of *Nollan / Dolan* principles.

The third ground upon which the Ninth Circuit based its decision presents a more novel question, but one that calls for the Court's consideration as a necessary corollary to resolving the first two questions. The substance of the Ninth Circuit's ruling is that a permit applicant waives his right to seek relief from an unconstitutional condition if he accedes to permit terms that grant an ancillary discretionary benefit (here, the waiver of permit fees) along with permit approval. This theory, however, is no more than a subterfuge to circumvent the doctrine of unconstitutional conditions. If not reversed, it can readily be exploited to all but nullify the doctrine of unconstitutional conditions.

Cardozo L. Rev. 1563 (2006); John C. Keene, WHEN DOES A REGULATION "GO TOO FAR?", 14 Penn St. Envtl. L. Rev. 397 (2006); Sarah B. Nelson, COMMENT, *LINGLE V. CHEVRON USA, INC.*, 30 Harv. Envtl. L. Rev. 281 (2006); W. Barr, H. Weissmann, J. Frantz, THE GILD THAT IS KILLING THE LILY, 73 Geo. Wash. L. Rev. 429 (2005); Mark Fenster, TAKINGS FORMALISM AND REGULATORY FORMULAS: EXACTIONS AND THE CONSEQUENCES OF CLARITY, 92 Cal. L. Rev. 609 (2004); J. David Breemer, THE EVOLUTION OF THE "ESSENTIAL NEXUS," 59 Wash. & Lee L. Rev. 373, 395-96 (2002).

A. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH *DOLAN V. CITY OF TIGARD* AND WITH DECISIONS OF OTHER COURTS HOLDING THAT PERMIT CONDITIONS REQUIRING PUBLIC INFRASTRUCTURE UPGRADES ARE SUBJECT TO *DOLAN'S* HEIGHTENED SCRUTINY.

The Ninth Circuit held that government may require an individual permit applicant to upgrade public infrastructure to a legislatively established standard without regard to *Dolan's* rough proportionality requirement. They reasoned that such a requirement is not a land use exaction at all but, instead, "a general requirement imposed through legislation."[5] App. A at 15a. This holding conflicts with *Dolan* and with decisions of other courts which have addressed *Dolan's* applicability to permit conditions requiring public infrastructure upgrades.

Contrary to the Ninth Circuit's holding, *Dolan* indicates that a permit condition that calls for new public infrastructure is not exempt from heightened scrutiny simply because it requires upgrading to a legislatively prescribed standard. In *Dolan,* the City of Tigard required Mrs. Dolan to dedicate real estate for new public infrastructure: a public greenway and a pedestrian/bicycle pathway. These dedications were required to satisfy the legislatively established site

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[5] The Ninth Circuit held that such legislation is subject to judicial review only under the deferential *ad hoc* standards of *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978). App. A at 10a.

development standards set by the City's Community Development Code ("CDC").[6] *See Dolan,* 512 U.S. at 379-380. The fact that the dedications were mandated by legislation and imposed to satisfy legislative standards, however, did not exempt them from heightened scrutiny. Legislative standards and policy must be implemented in a constitutional manner and here, as in *Dolan,* "the Takings Clause requires the city to implement its policy by condemnation" unless the City makes the required showing of nexus and rough proportionality between the impacts of the new development and the burden of the exaction. *Dolan,* 512 U.S. at 395 n.10. The Ninth Circuit's contrary holding is a direct repudiation of *Dolan*.

The Ninth Circuit's decision also is directly at odds with the decision of the Texas Supreme Court in *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 47 Tex. Sup. Ct. J. 497, 135 S.W.3d 620 (2004). There, the court ruled that heightened scrutiny does apply to a permit condition requiring the developer to upgrade a public street adjoining the development. The applicable legislative authority in *Town of Flower Mound* was equivalent to that in *Dolan* and in this case: a local ordinance that assigned the permit applicant responsibility to bring adjoining public infrastructure up to legislatively prescribed standards. After carefully analyzing *Dolan,* the Texas Supreme Court concluded that there was no meaningful

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[6] The CDC provided, in pertinent part, "the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway." CDC § 18.120.180.A.8 (emphasis added).

distinction between a permit condition which requires the applicant to use its money to upgrade public infrastructure to legislative standards and the permit condition in *Dolan* which required a dedication of land to meet legislative standards. Other courts have reached the same result.[7]

The Ninth Circuit took a different tack to reach the opposite conclusion. Rather than adhering to *Dolan*, it based its rule on state court decisions which have held that generally applicable development impact fees

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[7] *See, e.g., Benchmark Land Co. v. City of Battle Ground*, 103 Wn.App. 721, 14 P.3d 172 (2000) (*aff'm on other grounds, Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 49 P.3d 860 (2002) (half-street improvements to fronting streets mandated by ordinance held subject to heightened scrutiny); *Amoco Oil Co. v. Village of Schaumburg*, 277 Ill.App.3d 926, 940, 661 N.E.2d 380, 389 (1995) (legislative dedication requirement subject to *Nollan/Dolan* scrutiny) (*cert denied* 519 U.S. 976); *Schultz v. City of Grants Pass*, 131 Or.App. 220, 884 P.2d 569 (1994) (dedication of land for street improvements as required by ordinance subject to heightened scrutiny); *Simpson v. City of North Platte*, 206 Neb. 240, 292 N.W.2d 297 (1980) (street dedication required by ordinance invalid where dedication did not relate to impact of new development); *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 165 Ill.2d 25, 649 N.E.2d 384 (1995) (interpreting state constitution, court held traffic impact fee subject to heightened scrutiny); *United Dev. Corp. v. City of Mill Creek*, 106 Wn.App. 681, 26 P.3d 943 (2001), *rev. den.*, 35 P.3d 380 (2001) (drainage upgrade requirement invalid under statute and ordinance unless it directly mitigates impact of new development). *Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (transfer of interest on funds held in court registry to court clerk pursuant to statutory mandate constitutes taking of property without just compensation); *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003) (transfer of private funds to government as mandated by court rule is "more akin" to physical taking than to regulation of property).

are exempt from heightened *Nollan / Dolan* scrutiny.[8] App. A at 11a. The Ninth Circuit reasoned that if legislatively prescribed impact fees are exempt from heightened scrutiny, then a legislatively prescribed public infrastructure upgrade must also be exempt from heightened scrutiny.

The rationale of the impact fee decisions, however, does not extend to permit conditions which impose individual public infrastructure upgrade requirements.[9] Those cases involved broad based fees calculated in accordance with legislatively prescribed formulae and uniformly applied to legislatively determined classes. Such uniform fee structures do not pose the same risk of unfair, disproportionate leveraging as permit conditions requiring individuals to make unique upgrades to public infrastructure. Individualized upgrade exactions are not formulaic fees which rationally and uniformly apportion public infrastructure costs to classes of properties which create the infrastructure needs. Instead, Mrs. Dolan and the McClungs were arbitrarily selected to bear unique and disproportionate upgrade burdens simply

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[8] *City of Olympia v. Drebick*, 156 Wn.2d 289, 126 P.3d 802 (2006); *San Remo Hotel L.P. v. City & Cty. of San Francisco*, 117 Cal. Rptr.2d 269, 41 P.3d 87 (Cal. 2002); *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 187 Ariz. 479, 930 P.2d 993 (1997); *McCarthy v. City of Leawood*, 257 Kan. 566, 894 P.2d 836 (1995). *See also, Parking Ass'n of Georgia v. City of Atlanta*, 264 Ga. 764, 450 S.E.2d 200 (1994), *cert. den.* 515 U.S. 1116 (1995) (*Dolan* does not apply to a development condition imposed through a legislative process rather than through individualized determinations).

[9] The validity of these impact fee decisions has not been addressed by the Court and is not placed at issue by the facts of this case.

because they happened to apply for building permits to improve their property.

The Ninth Circuit's analysis went astray, in part, because it failed to follow the path laid out by this Court for analyzing land use exactions. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546-47 (2005). That analysis starts by asking whether, absent a permit application, the City would have been required to pay compensation if it had forced the McClungs to upgrade the City's stormwater pipe. If the answer is *yes* (and *Dolan* makes clear that the answer is *yes*), then compensation is required unless the government establishes nexus and rough proportionality. *See First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 315 (1987) (government action that works a taking necessarily implicates the obligation to pay just compensation).

The Ninth Circuit's decision, if not reversed, will seriously undermine *Dolan* and the protections of the Takings Clause. It allows municipalities to allocate public infrastructure costs arbitrarily, rather than according to the specific impacts of a proposed development or according to a rational and uniform scheme of generally applicable impact fees. It permits gross inequity in the allocation of infrastructure costs and allows municipalities to do exactly what the Takings Clause forbids: select some to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Court should, therefore, grant the writ to resolve the conflicts and confusion over the application of *Nollan / Dolan* scrutiny to permit conditions that require public infrastructure upgrades.

B. THE COURT SHOULD CLARIFY THE APPLICATION OF HEIGHTENED SCRUTINY TO MONETARY LAND USE EXACTIONS.

As an alternative ground for its holding, the Ninth Circuit ruled that heightened scrutiny does not apply to monetary exactions because monetary exactions do not require the applicant to "relinquish rights in the real property" and because "money is fungible." App. A at 16a, 17a. This, too, is a question hotly debated by courts and commentators. Some courts and commentators suggest that *Nollan / Dolan* scrutiny does not apply to monetary exactions.[10] Most courts, however, disagree.[11] The Court should accept review

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[10] *San Remo Hotel, L.P. v. S.F. City & County*, 364 F.3d 1088 (9th Cir. 2004), *aff'd on other grounds*, 545 U.S. 323 (2005); *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998); *Commercial Builders of N. Cal. v. Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. den.*, 504 U.S. 931 (1992). *See also*, *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 187 Ariz. 479, 486, 930 P.2d 993, 1000 (1997) (fee is a "considerably more benign form of regulation" and therefore not subject to heightened scrutiny) *cert. denied* 521 U.S. 1120 (1997)); *Commonwealth Edison Co. v. U.S.*, 271 F.3d 1327, 1340 (Fed.Cir. 2001), *cert. den.*, 535 U.S. 1096 (2002); *United States v. Sperry Corp.*, 493 U.S. 52 (1989) (percentage fee exacted from Iran-United States Claims Tribunal award as service fee is not a *per se* taking); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 539-550 (1998) (J. Kennedy *concurring and dissenting*; excessive payment required by Coal Act not considered taking of property); Daniel Pollak, REGULATORY TAKINGS: THE SUPREME COURT TRIES TO PRUNE AGINS WITHOUT STEPPING ON *NOLLAN* AND *DOLAN*, 33 Ecology L.Q. 925, 931 (2006).

[11] *Rose Acre Farms, Inc. v. U.S.*, 373 F.3d 1177, 1197 (Fed Cir. 2004), *cert. den.*, 545 U.S. 1104 (2005); *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), *cert. den.*, 543 U.S. 956 (2004), *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620

to resolve whether monetary exactions are *per se* exempt from *Noilan / Dolan* scrutiny and whether government can require a permit applicant to pay for upgrading public infrastructure without regard to the limitations of *Nollan / Dolan.*

There are three compelling reasons why there should be no distinction between a land use permit condition that requires an applicant to dedicate an interest in real property and a condition that requires the applicant to pay to build new public infrastructure. First, the Takings Clause extends to all property:

(2004); *Ehrlich v. City of Culver City*, 50 Cal.Rptr.2d 242, 246, 11 P.2d 429, 433 (1996), *cert. den.*, 519 U.S. 929 (1996) ("We thus reject the city's contention that the heightened takings clause standard formulated by the Court in *Nollan* and *Dolan* applies only to cases in which the local land use authority requires the developer to dedicate real property to public use as a condition of permit approval."); *Benchmark Land Co. v. City of Battle Ground*, 103 Wn.App. 721, 14 P.3d 172 (2000); *Honesty in Envtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn.App. 522, 979 P.2d 864 (1999); *Clark v. City of Albany*, 137 Or.App. 293, 904 P.2d 185 (1995); *St. Johns River Water Mgmt. Dist. v. Koontz*, --- So.2d ----, 2009 WL 47009, 3 (Fla.App. 2009). *Cf. Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003) (required transfer of private funds to government is "more akin" to physical taking than to regulation of property); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155,162 (1980) (exaction of interest on funds held in court as taking); *Washington Legal Found. v. Legal Found. of Washington*, 236 F.3d 1097, 1110 (9th Cir. 2001) ("[t]he Fifth Amendment protection of property would be eviscerated were we to construe confiscation of fungible intangibles [money] as not amounting to a taking, as defendants urge.") *modified on rehearing en banc*, 271 F.3d 835, *aff'd on other grounds*, *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003); *Garneau v. City of Seattle*, 147 F.3d 802, 815 (9th Cir. 1998) (J. O'Scannlain *concurring and dissenting*).

money is no exception. *Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (monetary exaction that is not reasonably related to services provided to or burdens created by the payor is a taking of property, not merely an exercise of police power). When property (including money) is taken for public use, compensation is required. The obligation to pay compensation depends on the nature of the taking, not the type of property taken.[12] It does not matter that money is fungible: fungibility does not determine whether compensation is due when property is taken for public use.

Second, exempting monetary exactions from *Nollan / Dolan* scrutiny is fundamentally inconsistent with the very purpose of development mitigation exactions and fees. "Impact fees are payments required by local governments of new development for the purpose of providing new or expanded public capital facilities required to serve that development." American Planning Association, Policy Guide on Impact Fees, (ratified 1997). "The main goal of the imposition of exactions is 'to shift to the developer the costs of the public infrastructure that the development requires.' Essentially, exactions force developers to internalize the 'external cost' they impose on the surrounding community." *Rogers Mach., Inc. v. Washington County*, 181 Or.App. 369, 382, 45 P.3d 966, 973 (2002), *cert. den.*, 538 U.S. 906 (2003) (*quoting* Abraham Bell and Gideon Parchomovsky, GIVINGS,

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[12] Obviously, there are circumstances in which government may legitimately require the payment of money or other property without compensation, *e.g.*, taxation, legitimate fees and penalties. But absent such circumstances, heightened scrutiny should apply to exactions of money, just as any other property.

111 Yale L.J. 547, 609 (2001)).[13] By requiring a somewhat tight fit between the exaction and the external costs produced by the new development, *Dolan* helps assure that the exaction serves this cost internalization function. If the fit is loosened, the exaction no longer corresponds to the external costs of the development and becomes just another method of raising revenue. And, because land use exactions are so highly susceptible to leveraging and other abuses, they will inevitably be used for improper, cost shifting purposes.

This case vividly illustrates the concern. The obligation imposed on the McClungs did not mitigate the external costs produced by their new development. Their development had almost nothing to do with the need for the new stormwater pipe. Rather, the McClungs were arbitrarily selected to pay for the new pipe simply because they happened to apply for a building permit. *Cf. Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269, 1274 (8th Cir. 1994) (arbitrary imposition of disproportionate share of cost for public drainage system is unconstitutional). Without the rough proportionality standard to police such abuse, monetary land use exactions can be transformed from a legitimate regulatory tool that

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[13] *See also, Upton v. Town of Hopkinton*, 157 N.H. 115, 119, 945 A.2d 670, 674 (2008); *Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 685 (Minn.,1997) ("[K]ey to the concept of a true impact fee is that the amount assessed a developer must reflect the cost of infrastructure improvements necessitated by the development itself."); Jonathan H. Adler, MONEY OR NOTHING: THE ADVERSE ENVIRONMENTAL CONSEQUENCES OF UNCOMPENSATED LAND USE CONTROLS, 49 B.C. L. Rev. 301, 303-304 (2008).

compels developers to internalize externality costs into an abusive fund raising device the exploits the government's permit power monopoly.

Finally, if monetary exactions generally were exempt from *Nollan / Dolan* scrutiny, the exemption would swallow the rule. Government could effectively evade *Nollan / Dolan* scrutiny even for exactions of real property by first exacting money in any disproportionate amount (free from the shackles of *Nollan / Dolan*), then use the money to buy the land in a condemnation proceeding or otherwise. *Garneau v. City of Seattle*, 147 F.3d 802, 815 (9th Cir. 1998)(J. O'Scannlain *concurring and dissenting). See also, Benchmark Land Co. v. City of Battle Ground*, 103 Wn.App. 721, 727, 14 P.3d 172, 175 (2000). In this way, the constraints of *Nollan / Dolan* could be avoided for any type of property – including real property. The ultimate result would be that heightened scrutiny would no longer be a requirement for any land use exactions at all.

The Court should grant certiorari to reverse the Ninth Circuit's alternative holding, make clear that monetary exactions are not *per se* exempt from *Nollan / Dolan* scrutiny, and rule that compensation is required where government requires the permit applicant to pay for new public facilities beyond what is necessary to mitigate the impacts of the applicant's new development.

C. THE NINTH CIRCUIT'S IMPLIED CONTRACT THEORY IS A SUBTERFUGE TO EVADE THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS AND SHOULD BE REVERSED.

The Ninth Circuit ruled that the McClungs relinquished their right to seek just compensation for upgrading the City's pipe from 12 inches to 24 inches because they voluntarily agreed to make that portion of the upgrade in exchange for a waiver of permit fees. App. A at 22a. This interpretation of the McClungs' permit conditions reflects a disturbing disregard of the facts, and appears to be simply a subterfuge to avoid the doctrine of unconstitutional conditions. That interpretation should be reviewed and reversed.

The doctrine of unconstitutional conditions "limits the government's ability to exact waivers of rights as a condition of benefits" because "[g]iving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections." *U.S. v. Scott*, 450 F.3d 863, 866-867 (9th Cir. 2006). Unless the nexus and proportionality requirements of *Nollan/Dolan* are satisfied, the doctrine prohibits government from conditioning a land use permit on a property transfer that would otherwise require just compensation. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005); *Lambert v. City and County of San Francisco*, 529 U.S. 1045 (2000) (J. Scalia, *dissenting from denial of certiorari*).

To avoid the doctrine of unconstitutional conditions, the Ninth Circuit construed the terms of

the McClungs' building permit as consisting of two independent components: (1) a building permit that required the McClungs to install a 12-inch pipe, and (2) a separate, voluntary side-agreement in which the McClungs agreed to install an even larger 24-inch pipe in return for a waiver of permit fees. App. A at 10a. This voluntary side agreement, in the court's view, did not implicate the doctrine of unconstitutional conditions because it did not involve the coercive exercise of the City's permit power to gain the McClungs' assent to the bargain.

This "voluntary agreement" theory, however, is a complete fabrication which is directly at odds with the uncontroverted facts. The City's December 27, 1995 letter setting the terms of the McClungs' permit states unequivocally: "*a 24-inch diameter storm drain is to be installed as a condition of development.*" App. E at 55a.[14] The Ninth Circuit's claim that "the McClungs were given the choice of either installing a 12-inch pipe and paying the usual fees, or installing a 24-inch pipe and receiving the fee waiver" (App. A at 21a) is not true and not supported by any facts in the record. There was no option for the McClungs to install a 12-inch pipe. The upgrade to 24 inches was mandatory. The McClungs' only choice was between installing a 24-inch pipe with a fee waiver or foregoing their permit. Because the 24-inch upgrade obligation, even with the fee waiver, was wholly disproportional to the impact of their new development, it was an

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[14] Especially in the context of summary judgment – where the facts are to be construed most favorably to the McClungs – the Ninth Circuit's disregard of the evidence is extraordinary. The December 27, 1995 letter means what it says: "a 24-inch diameter storm drain is to be installed as a condition of development."

unconstitutional condition for which the McClungs are entitled to compensation.

Rightful concerns have been expressed that lower courts may be seeking to evade the mandate of *Nollan / Dolan*. *See Lambert v. City and County of San Francisco, supra*. It is difficult to conceive of another explanation for the Ninth Circuit's clear disregard of the facts. Its voluntary agreement theory seems merely a subterfuge to evade the reach of the doctrine of unconstitutional conditions. If that subterfuge is permitted to stand, it will further undermine the uniform application of *Nollan / Dolan* principles and potentially undermine the doctrine of unconstitutional conditions in other contexts as well. If ancillary terms to a permit, license, or contract can be construed as creating separate, voluntary side-agreements whenever the underlying permit or contract implicates the doctrine of unconstitutional conditions, it is apparent that the scope and effectiveness of that doctrine in controlling government abuses will be greatly reduced.

CONCLUSION

The nexus and rough proportionality standards of *Nollan / Dolan* serve two complementary functions. First, they promote effective land use regulation by requiring that permit conditions actually address the externality impacts of proposed development. Without a tight linkage between the public burden created by a development and the mitigation burden placed on the developer, this regulatory purpose is lost. Second, *Nollan / Dolan* standards protect property owners from arbitrarily being selected to "bear public burdens which, in all fairness and justice, should be

borne by the public as a whole." *Armstrong v. United States*, *supra*. To clarify and promote the uniform application of *Nollan / Dolan* principles, the petition for writ of certiorari should be granted.

Respectfully submitted,

MALCOLM S. HARRIS
Counsel of Record

WILLIAM C. SEVERSON
999 Third Avenue Suite 3210
Seattle, WA 98104-4049
Telephone: (206) 838-4191
Facsimile: (206) 838-4193

Counsel for Petitioners Daniel & Andrea McClung

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-35231
D.C. No. CV-06-05006-RBL

[Filed September 25, 2008]
[Amended December 1, 2008]

DANIEL MCCLUNG; ANDREA MCCLUNG, individually and as a marital community, *Plaintiffs-Appellants*,	)
and	)
TAPPS BREWING, INC., a Washington corporation, *Plaintiff*,	)
v.	)
CITY OF SUMNER, *Defendant-Appellee*.	)

ORDER AMENDING OPINION AND DENYING REHEARING AND AMENDED OPINION

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Argued and Submitted
July 11, 2008—Seattle, Washington

Filed September 25, 2008
Amended December 1, 2008

Before: Richard R. Clifton and N. Randy Smith, Circuit Judges, and J. Michael Seabright,* District Judge.

Opinion by Judge Seabright

COUNSEL

William C. Severson, William C. Severson PLLC, Seattle, Washington, for the plaintiffs-appellants.

Michael C. Walter, Keating, Bucklin & McCormack, Inc., Seattle, Washington, for the defendant-appellee.

ORDER

The opinion filed on September 25, 2008, is amended as follows:

On slip Opinion page 13750, insert a new footnote 3 at the bottom of the page after the sentence that

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* The Honorable J. Michael Seabright, United States District Judge for the District of Hawaii, sitting by designation.

ends ". . . applies to Ordinance 1603." (and renumber the subsequent footnotes):

> We observe that the ordinance before us concerns a permit condition designed to mitigate the adverse effects of the new development. New construction increases the burden on the City's sewer system and increases the loss that might result from flooding. After experiencing considerable flooding, the City enacted Ordinance 1603 to require most new developments to include specified storm pipes. We are not confronted, therefore, with a legislative development condition designed to advance a wholly unrelated interest. We do not address whether *Penn Central* or *Nollan/Dolan* would apply to such legislation.

With the opinion as amended, Judge Clifton and Judge N.R. Smith voted to deny the petition for rehearing en banc and Judge Seabright so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc, filed October 9, 2008, is DENIED.

No further petitions for rehearing or rehearing en banc may be filed by the parties.

OPINION

SEABRIGHT, District Judge:

In 1995, Daniel and Andrea McClung (the "McClungs") sought to develop property they owned in the City of Sumner (the "City"), and learned that their underground storm drain pipe did not meet the City's requirement for new developments to include pipes at least 12 inches in diameter. The McClungs assert that the City's subsequent request that they install a 24-inch pipe in exchange for the City approving their permit application and waiving certain permit and facilities fees effected an illegal taking of their property. This case presents an issue of first impression in this Circuit — whether a legislative, generally applicable development condition that does not require the owner to relinquish rights in the real property, as opposed to an adjudicative land-use exaction, should be reviewed pursuant to the ad hoc standards of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), or the nexus and proportionality standards of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). We affirm, holding that the *Penn Central* analysis applies to the 12-inch pipe requirement. As for the installation of the 24-inch pipe, we conclude that the McClungs voluntarily contracted with the City to install the 24-inch pipe and thus the installation of that pipe was not a "taking" by the City.

I.

Between 1990 and 1992, the City experienced considerable flooding. To address this problem, the

City took several steps, including adopting Ordinance 1603 which requires most new developments to include storm pipes with a minimum 12-inch diameter, outlining plans for the City to replace certain storm pipes with 18-, 21-, and 24-inch pipe, and constructing a storm drainage trunk line paid for in part through raising the stormwater general facility charge ("GFC") imposed on property owners.

Between 1983 and 1993, the McClungs purchased four adjoining residential properties in the City, and in May 1994, approached the City about converting one property into a Subway sandwich shop and paving an alley for use as a parking lot. The City had previously vacated this alley in exchange for certain conditions, including receiving an easement for public utilities and services that ran under the alley. During the course of discussions regarding the steps the McClungs would need to take to comply with the City's flood requirements, the parties learned that the storm pipe under the property was 12-inch pipe for four feet, then changed to 6-inch pipe for the remaining 350 feet. Because this pipe did not comply with Ordinance 1603 and did not meet the City plans for replacing certain pipes with 24-inch pipe, the City Engineer, via letter, offered to waive certain fees in exchange for the McClungs installing a 24-inch instead of 12-inch pipe:

> To correct existing deficiencies, meet the needs of your development and satisfy the future requirements as outlined in the Storm Water Comprehensive Plan, a 24-inch diameter storm drain is to be installed as a condition of development.
>
> . . .

> As a developer, you are required to install a 12-inch storm drain as a minimum. My estimate shows the cost difference between a 12-inch and a 24-inch diameter pipe ranges from $7,200 to $7,500. To offset the cost of the oversizing to meet the City's Comprehensive Plan requirements, the City will waive the storm drainage General Facilities Charge, permit fees, plan review and inspection charges of the storm drainage systems for both the development and the Subway Shop. . . . If you find this acceptable, please proceed with the revisions to the Plans.

The McClungs revised their development plan to include a 24-inch pipe, which was approved on April 25, 1996. A 24inch pipe was subsequently installed on the property.

Despite voicing no objection to the 24-inch pipe installation requirement and receiving the benefit of certain fees being waived, on April 27, 1998, the McClungs filed a complaint in Washington state court asserting violations of Washington state law. After several years of protracted state court litigation (including a summary judgment motion, an appeal, a trial, and further appeals), the Washington appeals court found that the McClungs should be permitted to amend their complaint to allege explicitly a violation of their Fifth Amendment rights and remanded the action to the trial court. *Tapps Brewing, Inc. v. McClung*, 2005 WL 151932, at *8 (Wash. App. Jan. 25, 2005).

The McClungs subsequently amended their complaint to allege that the City's requirement that

they upgrade the storm drain was a taking in violation of the Fifth Amendment. In response, the City removed the action to the United States District Court for the Western District of Washington.

On cross-motions, the McClungs sought summary judgment on their federal takings claim, and the City sought summary judgment on all remaining claims.[1] *See Tapps Brewing, Inc. v. City of Sumner*, 482 F. Supp. 2d 1218, 1224-25 (W.D. Wash. 2007). For the McClungs' takings claim, the court separately analyzed Ordinance 1603's requirement that all new developments include 12-inch storm pipe and the City's request that the McClungs install a 24-inch storm pipe. Applying the ad hoc analysis of *Penn Central*, the court determined that the 12-inch storm pipe requirement was not an unconstitutional taking. *Id.* at 1228-31. Regarding the 12-inch to 24-inch request, the court found that the McClungs had contracted to install the 24-inch pipe in exchange for a waiver of the GFC and various fees. *Id.* at 1231. The McClungs' appeal followed.

II.

The district court's grant of summary judgment in favor of the City is reviewed de novo, under the same standards applied by the district court. *Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, 538 F.3d 1090, 1094 (9th Cir. 2008). "We must determine

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[1] The district court granted the City's motion on the McClungs' state law claims. *See Tapps Brewing, Inc. v. City of Sumner*, 482 F. Supp. 2d 1218, 1231-33 (W.D. Wash. 2007). The McClungs do not appeal this determination.

whether, viewing the evidence in the light most favorable to the nonmoving party, any genuine issues of material fact exist, and whether the district court correctly applied the relevant substantive law." *Fazio v. City & County of S.F.*, 125 F.3d 1328, 1331 (9th Cir. 1997).

III.

A.

Before turning to the merits of this appeal, we address briefly the issue of ripeness, "lest we overstep our jurisdiction."[2] *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 871 (9th Cir. 2001) (en banc).

Ripeness "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993); *Portman v. County of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993) ("The ripeness inquiry contains both a constitutional and a prudential component."). While Article III ripeness is jurisdictional, "[p]rudential considerations of ripeness are discretionary. . . ." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1142 (9th Cir. 2000) (en banc).

[1] Although the Supreme Court has described takings claim ripeness as addressing prudential rather

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[2] The district court found the McClungs' claim ripe for review. *See Tapps Brewing, Inc.*, 482 F. Supp. 2d at 1227-28. On appeal, the City originally argued that the McClungs' takings claim was not ripe, but then at the hearing agreed with the McClungs that the claim was indeed ripe.

than Article III considerations, *see Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733-34 (1997) (describing the ripeness standard of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson*, 473 U.S. 172 (1985), as a "prudential hurdle" to a regulatory takings claim), our Circuit has analyzed takings claim ripeness as raising both prudential and Article III considerations. *Compare Beverly Blvd. LLC v. City of West Hollywood*, 238 Fed. Appx. 210, 212 (9th Cir. 2007) ("We need not resolve whether this claim is ripe under the standards articulated in *Williamson* . . . and . . . assume without deciding that the takings claims are ripe in order to reject them on the merits."); *and Weinberg v. Whatcom County*, 241 F.3d 746, 752 n.4 (9th Cir. 2001) ("We assume without deciding that the Federal takings claim is ripe."); *with West Linn Corporate Bank L.L.C. v. City of West Linn*, 534 F.3d 1091, 1099 (9th Cir. 2008) (describing ripeness as "'determinative of jurisdiction'" (quoting *S. Pac. Transp. Co. v. City of L.A.*, 922 F.2d 498, 502 (9th Cir. 1990))); *Vacation Village, Inc. v. Clark County*, 497 F.3d 902, 912 (9th Cir. 2007) (same); *and Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 661 (9th Cir. 2003) (affirming district court's determination of lack of subject matter jurisdiction based on a *Williamson* analysis).

[2] We need not determine the exact contours of when takings claim ripeness is merely prudential and not jurisdictional. In this case, we easily conclude that the facts presented raise only prudential concerns. The McClungs installed the storm pipe over ten years ago, resulting in a clearly defined and concrete dispute. *See Thomas*, 220 F.3d at 1139 (stating that Article III ripeness requires the court to analyze whether the

"alleged injury is too 'imaginary' or 'speculative' to support jurisdiction"). Because this case raises only prudential ripeness concerns, we have discretion to assume ripeness is met and proceed with the merits of the McClungs' takings claim. Accordingly, we do not resolve whether this claim is ripe under the standards articulated in *Williamson*, and instead assume without deciding that the takings claim is ripe in order to address the merits of the appeal.

B.

At issue are two different upgrades — Ordinance 1603 requiring that all new developments include a minimum of 12-inch storm pipe, and the request that the McClungs install a 24-inch pipe. We analyze these two upgrades separately, and hold that the district court properly found that the *Penn Central* analysis applies to the 6- to 12- inch requirement, and that the McClungs contracted to install a 24-inch pipe.

1.

[3] The Ninth Circuit has yet to address whether a legislative, generally applicable development condition that does not require the owner to relinquish rights in the real property, as opposed to an adjudicative land-use exaction, should be addressed under the *Penn Central* or *Nollan/Dolan* framework. Other courts addressing this general issue have come to different conclusions. *Compare Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1579 (10th Cir. 1995) (finding that "[g]iven the important distinctions between general police power regulations and development exactions, and the resemblance of development exactions to physical takings cases, we believe that the 'essential nexus' and

'rough proportionality' tests are properly limited to the context of development exactions"); *City of Olympia v. Drebick*, 126 P.3d 802, 807-08 (Wash. 2006) (rejecting the view "that local governments must base GMA impact fees on individualized assessments of the direct impacts each new development will have on each improvement planned in a service area"); *San Remo Hotel L.P. v. City & County of S.F.*, 41 P.3d 87, 104-05 (Cal. 2002) (distinguishing between a fee condition applied to a single property that would be subject to *Nollan / Dolan* review, and a generally applicable development fee); *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997) (finding that *Dolan* does not apply to a generally applicable legislative decision); *and McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995) (concluding that nothing in *Dolan* supports its application to impact fees); *with Town of Flower Mound v. Stafford Estates Ltd.*, 135 S.W.3d 620, 636 (Tex. 2004) (finding that the *Nollan / Dolan* analysis is not limited to dedications of land); *and Home Builders Ass'n v. City of Beavercreek*, 729 N.E.2d 349, 356 (Ohio 2000) (applying *Nollan / Dolan* in "evaluating the constitutionality of an impact fee ordinance").

After reviewing the cases establishing these tests and the principles underlying them, we conclude that *Penn Central* applies to Ordinance 1603.[3]

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[3] We observe that the ordinance before us concerns a permit condition designed to mitigate the adverse effects of the new development. New construction increases the burden on the City's sewer system and increases the loss that might result from flooding. After experiencing considerable flooding, the City enacted Ordinance 1603 to require most new developments to include specified storm pipes. We are not confronted, therefore,

A plaintiff seeking to challenge a government action as an uncompensated taking of private property may proceed under one of four theories: by alleging (1) a physical invasion of property, (2) that a regulation completely deprives a plaintiff of all economically beneficial use of property, (3) a general regulatory takings challenge pursuant to *Penn Central*, or (4) a land-use exaction violating the standards set forth in *Nollan* and *Dolan*. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005). At issue here is application of the latter two doctrines.

[4] In *Penn Central*, the New York City Landmarks Preservation Commission refused to approve plans to construct an office building over Grand Central Terminal due to its "landmark" status under the Landmarks Preservation Law. *Penn Central*, 438 U.S. at 116-17. *Penn Central* recognized that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 124 (citation omitted); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322-23 (2002) (distinguishing cases involving physical possession of property versus regulations that do not cause a categorical taking). *Penn Central* acknowledged that it was "unable to develop any 'set formula'" for evaluating these types of claims, but identified relevant factors, such as the economic

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with a legislative development condition designed to advance a wholly unrelated interest. We do not address whether *Penn Central* or *Nollan / Dolan* would apply to such legislation.

impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action. *Penn Central*, 438 U.S. at 124; *see also Lingle*, 544 U.S. at 538-39 (discussing *Penn Central*).

In comparison to *Penn Central*, "[b]oth *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions — specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." *Lingle*, 544 U.S. at 546. In *Nollan*, the California Coastal Commission conditioned the grant of Nollan's development/rebuilding permit of his beachside home on Nollan's dedication of an easement on the property to the public. *Nollan*, 483 U.S. at 828. In *Dolan*, the Oregon Land Use Board of Appeals conditioned the grant of Dolan's permit to expand a store and parking lot on Dolan's dedication of a portion of the relevant property as a "greenway" and bicycle/pedestrian pathway. *Dolan*, 512 U.S. at 379-80. The Supreme Court recently described the holdings of these cases as follows:

> In each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking. [*Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831-32]. The question was whether the government could, without paying the compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government

> was entitled to deny. The Court in *Nollan* answered in the affirmative, provided that the exaction would substantially advance the same government interest that would furnish a valid ground for denial of the permit. [*Nollan*, 483 U.S. at 834-37.] The Court further refined this requirement in *Dolan*, holding that an adjudicative exaction requiring dedication of private property must also be "'rough[ly] proportiona[l]' . . . both in nature and extent to the impact of the proposed development." [*Dolan*, 512 U.S. at 391.]

Lingle, 544 U.S. at 546-47. In *Nollan*, the Court stuck down the condition as an unconstitutional taking because there was no logical connection (i.e., no "essential nexus") between the adverse impacts of the development and the required easement. *Nollan*, 483 U.S. at 837. In *Dolan*, the Court found the exactions unconstitutional because the City failed to show that the conditions were roughly proportional to the negative impacts caused by the development. *Dolan*, 512 U.S. at 394-95.

The facts of *Nollan* and *Dolan* — involving adjudicative, individual determinations conditioning permit approval on the grant of property rights to the public — distinguish them from the line of cases upholding general land use regulations. *Dolan*, 512 U.S. at 384-85. Unlike the facts of *Dolan*, cases questioning land use regulations "involve[ ] essentially legislative determinations classifying entire areas of the city" and placing limitations on the use owners may make of their property. *Id.* at 385. In comparison to legislative land determinations, the *Nollan / Dolan* framework applies to adjudicative land-use exactions

where the "government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." *Lingle*, 544 U.S. at 546. Indeed, the Supreme Court has recognized that it has "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions — land-use decisions conditioning approval of development on the *dedication of property* to public use." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) (emphasis added); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 772 n.11 (9th Cir. 2000), *aff'd* 535 U.S. 302 (2002) (noting that the *Nollan/Dolan* framework applies to "land-use decisions conditioning approval of development on the dedication of property to public use" and is "inapposite to regulatory takings cases outside [this] context").

[5] Applying the general principles underlying the *Nollan/ Dolan* and *Penn Central* cases, we hold that Ordinance 1603's requirement that new developments include at least 12-inch storm pipes is subject to review under the *Penn Central* analysis.

[6] Similar to *Penn Central*, which addressed whether restrictions imposed by law on the plaintiff's development of a landmark building effected a taking, *see Penn Central*, 438 U.S. at 122, at issue here is whether Ordinance 1603 — which applies to all new developments — effected a taking by requiring the McClungs to install a 12-inch pipe. Ordinance 1603 is akin to the "classic example" recognized by *Penn Central* of zoning laws that generally "do not affect existing uses of real property" but rather affect proposed development, and are upheld where the "'health, safety, morals, or general welfare' would be

promoted by prohibiting particular contemplated uses of land." *Id.* at 125 (quoting *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928)). That Ordinance 1603 required the McClungs to take the affirmative step of installing a new pipe, as opposed to prohibiting development generally, does not change the analysis. Indeed, Ordinance 1603 is less intrusive than such zoning laws because the McClungs were able to build their Subway sandwich shop after installation of the legislatively-mandated pipe.

Unlike *Nollan* and *Dolan*, the facts of this case involve neither an individual, adjudicative decision, nor the requirement that the McClungs relinquish rights in their real property. Ordinance 1603 was the source of the 12-inch storm pipe requirement, not an adjudicative determination applicable solely to the McClungs. Further, the City already had an easement for the storm pipe such that the McClungs gave up no rights to their real property. To extend the *Nollan/Dolan* analysis here would subject *any* regulation governing development to higher scrutiny and raise the concern of judicial interference with the exercise of local government police powers. As noted by *San Remo Hotel*, 41 P.3d at 105, any concerns of improper legislative development fees are better kept in check by "ordinary restraints of the democratic political process."

The McClungs make several arguments against application of the *Penn Central* standard, none of which is compelling. First, relying on *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), the McClungs argue that the requirement that they install a new pipe acted as a monetary exaction and resulted in a per se physical taking of their money, to which

Penn Central does not apply. *Brown* did not address monetary exactions, and in any event, did not apply the *Nollan/Dolan* analysis to the facts presented. Rather, *Brown* addressed the narrow issue of whether a transfer of interest accrued on an IOLTA account to the Legal Foundation of Washington was an uncompensated taking, and found that it should be analyzed under a per se approach as opposed to the *Penn Central* analysis. *Brown*, 538 U.S. at 235.

[7] We further reject the McClungs' characterization of Ordinance 1603 as creating a monetary exaction — it does not require the payment of money in exchange for permit approval. Rather, it provides an across-the-board requirement for all new developments. Even if the upgrade could be viewed as a monetary exaction for the cost of upgrading the storm pipe, however, *Nollan/Dolan* still would not apply. A monetary exaction differs from a land exaction — "[u]nlike real or personal property, money is fungible." *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989); *see also San Remo Hotel, L.P. v. S.F. City & County*, 364 F.3d 1088, 109798 (9th Cir. 2004), *aff'd* 545 U.S. 323 (2005) (stating that the state court's analysis of the state issues "was thus equivalent to the approach taken in this circuit, which has also rejected the applicability of *Nollan/Dolan* to monetary exactions such as the ones at issue here"); *Garneau v. City of Seattle*, 147 F.3d 802, 808 (9th Cir. 1998) (upholding a city ordinance that required landlords to pay a $1,000 per tenant relocation assistance fee to low income tenants displaced by the change of use or

substantial rehabilitation of a property);[4] *Commercial Builders of N. Cal. v. Sacramento,* 941 F.2d 872, 873-75 (9th Cir. 1991) (rejecting application of *Nollan* to ordinance that conditioned the issuance of nonresidential building permits on the payment of a fee used to assist in financing low-income housing).

Next, the McClungs attempt to recast the facts as involving an individualized, discretionary exaction as opposed to a general requirement imposed through legislation. The McClungs make this argument in recognition of the fact that at least some courts have drawn a distinction between adjudicatory exactions and legislative fees, which have less chance of abuse due to their general application. *See San Remo Hotel,* 41 P.3d at 104 (distinguishing between a fee condition applied to single property that would be subject to *Nollan / Dolan* review and a generally applicable development fee). The facts do not support the McClungs falling within the former category. All new developments must have at least 12-inch storm pipe; there is no evidence on the record that the McClungs were singled out.[5]

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[4] The main opinion of *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998), written by Judge Brunetti, found that the *Nollan / Dolan* analysis did not apply to this permit condition. *Id.* at 808. However, in concurring opinions, Judge O'Scannlain stated that *Nollan / Dolan* should apply, *id.* at 814, while District Judge Williams found that the permit condition should be analyzed under the Due Process Clause instead of the Fifth Amendment. *Id.* at 818. In the end, two of the three *Garneau* judges agreed that *Nollan / Dolan* did not apply to the permit requirement.

[5] The McClungs also argue that Ordinance 1603 does not require a developer to replace non-conforming storm pipe, and even if it did, the requirement is invalid under Revised Code of Washington

[8] In sum, we affirm the district court's determination that the *Penn Central* analysis applies to the requirement that the McClungs install a 12-inch storm pipe.[6]

2.

In comparison to the 12-inch requirement, the request that the McClungs install a 24-inch pipe was not based on any general regulation applicable to the McClungs, but rather an individualized request. We need not decide whether this factual difference affects whether the *Nollan / Dolan* or *Penn Central* analysis applies, however, because we hold that the McClungs impliedly contracted to install a 24-inch pipe. *See Hewitt v. Joyner*, 940 F.2d 1561, 1565 (9th Cir. 1991) ("It is well-established that this court should avoid

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("RCW") 82.02.020, which prohibits the City from imposing fees on developments. The district court previously found that Ordinance 1603 "established twelve inches as the minimum pipe size requirement for any new development in the City of Sumner." *Tapps*, 482 F. Supp. 2d at 1228 n.7. The district court also addressed, and granted summary judgment on, the McClungs' state law claim for violation of RCW 82.02.020. *Id.* at 1233. The McClungs did not appeal the district court's grant of summary judgment on the state law claims and did not raise either of these arguments in their Opening Brief. The McClungs are therefore precluded from making this argument.

[6] Because the McClungs' appeal is premised on the contention that *Nollan / Dolan* review should apply here — and they have not argued that the City was not entitled to summary judgment if *Penn Central* applied — our conclusion that *Penn Central* provides the proper standard resolves the McClungs' challenge to the City's 12-inch pipe requirement.

adjudication of federal constitutional claims when alternative state grounds are available.").

[9] Under Washington law, "[b]efore a court can find the existence of an implied contract in fact, there must be an offer; there must be an acceptance; the acceptance must be in the terms of the offer; it must be communicated to the offeror; there must be a mutual intention to contract; [and] there must be a meeting of the minds of the parties." *Milone & Tucci, Inc. v. Bona Fide Builders, Inc.*, 301 P.2d 759, 762 (Wash. 1956) (internal citation omitted). "[U]nder a unilateral contract, an offer cannot be accepted by promising to perform; rather, the offeree must accept, if at all, by performance, and the contract then becomes executed." *Multicare Med. Ctr. v. Dep't of Social & Health Servs.*, 790 P.2d 124, 131 (Wash. 1990). The City has the burden to "prove each essential fact [of a contract], including the existence of a mutual intention." *Cahn v. Foster & Marshall, Inc.*, 658 P.2d 42, 43 (Wash. App. 1983); *see also Bogle & Gates, P.L.L.C. v. Zapel*, 90 P.3d 703, 705 (Wash. App. 2004).

[10] In its December 27, 1995 letter, the City offered to waive certain permit fees in exchange for the McClungs' installation of a 24-inch storm pipe:

> As a developer, you are required to install a 12-inch storm drain as a minimum. My estimate shows the cost difference between a 12-inch and a 24-inch diameter pipe ranges from $7,200 to $7,500. To off-set the cost of the oversizing to meet the City's Comprehensive Plan requirements, the City will waive the storm drainage General Facilities Charge, permit fees, plan review and inspection charges of the storm

> drainage systems for both the development and the Subway Shop. . . . *If you find this acceptable, please proceed with the revisions to the Plans.*

(emphasis added). This letter provides the McClungs the choice of either agreeing to install a 12-inch pipe and pay the usual fees, or install a 24-inch pipe and receive the fee waiver. The McClungs accepted the latter option by revising their development plans and installing a 24-inch pipe. Thus, the McClungs impliedly contracted to install the 24-inch pipe.

[11] None of the McClungs' arguments against the existence of a contract has merit. First, the McClungs argue that installing the 24-inch pipe was a mandatory requirement. The plain language of the December 27, 1995 letter clearly shows otherwise. Second, the McClungs claim that they did not understand the letter as an offer. Their subjective intent, however, is irrelevant where their objective actions indicate acceptance of the offer. *See City of Everett v. Sumstad's Estate*, 631 P.2d 366, 367 (Wash. 1981) (stating that Washington follows the "objective manifestation theory of contracts"). Third, the McClungs argue that for there to be an implied contract, it would have to cover the entire upgrade from 6-inch to 24-inch pipe because the 6-inch to 12-inch requirement was illegal and/or contrary to *Nollan/Dolan*. As discussed above, *Nollan/Dolan* does not apply, and the district court rejected their state law claims. Finally, the McClungs argue that the City misrepresented its authority and the McClungs acted under compulsion. There is absolutely no legal or factual support for these arguments, and we reject this claim out of hand. Because the McClungs were not compelled to install a

24-inch pipe, but voluntarily contracted with the City to do so, there was simply no "taking" by the City.

IV.

We hold that the district court properly determined that the *Penn Central* standard applies to the City's requirement that the McClungs install a storm pipe at least 12 inches in diameter, and that the McClungs impliedly contracted to install a 24-inch pipe.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CASE NUMBER: C06-5006RBL

[Filed February 21, 2007]

TAPPS BREWING INC., DANIEL McCLUNG and ANDREA McCLUNG	)
v.	)
CITY OF SUMNER	)

JUDGMENT IN A CIVIL CASE

[✓] **Decision by Court.** This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiffs' Motion for Partial Summary Judgment on Federal Takings Issues is DENIED; Defendant's Motion for Summary Judgment on All Remaining Claims is GRANTED and the action is DISMISSED WITH PREJUDICE.

DATED: 2/21/2007

BRUCE RIFKIN

Clerk

/s/ Jean Boring

(By) Deputy Clerk, Jean Boring

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CASE NO. C06-5006RBL

[Filed February 16, 2007]

TAPPS BREWING INC., a Washington Corporation, and DANIEL McCLUNG and ANDREA McCLUNG, Individually and as a Marital Community,	)
Plaintiffs,	)
v.	)
CITY OF SUMNER,	)
Defendant.	)

ORDER GRANTING SUMMARY JUDGMENT

This matter comes before the Court on Plaintiffs' Motion for Summary Judgment on Federal Takings Issues (Dkt. 42-1) and Defendant's Motion for Summary Judgment on All Remaining Issues (Dkt. 45-1). The Court has considered the pleadings filed in support of and in opposition to the motions and the file herein.

I. FACTUAL AND PROCEDURAL BACKGROUND

The history of this case spans more than nine years. This dispute concerns a stormwater pipe upgrade requirement imposed by Defendant City of Sumner ("City") upon Plaintiffs Daniel and Andrea McClung ("Plaintiffs") in exchange for granting their development permit and waiving certain permit fees. Plaintiff Tapps Brewing is no longer a part of the action.

On April 27, 1998, Plaintiffs Tapps Brewing and Daniel and Andrea McClung filed suit in Pierce County Superior Court against the City of Sumner. Dkt. 5-2, at 3. Plaintiffs' complaint alleged that the City's General Facilities Charge ("GFC"), which was imposed on the Plaintiffs as a condition of obtaining a building permit, was illegal under state law. Dkt. 5-2, at 3.

On September 3, 1999, Plaintiffs filed a Motion for Summary Judgment. Dkt. 5-3, at 12. In their motion, they raised federal constitutional issues by citing a federal constitutional takings case. Dkt. 5-3, at 20. The Pierce County Superior Court denied the motion. Dkt. 7-8, at 11.

On November 1, 1999, Plaintiffs sought discretionary review of the court's decision. Dkt 7-9, at 1-2. The Washington Court of Appeals denied the request. Dkt. 7-9, at 6. The Plaintiffs filed a Motion to Modify the Commissioner's Ruling on April 11, 2000 (Dkt. 7-11, at 19), and entered into a stipulation with the City permitting appellate review pursuant to RAP 2.3(b)(3) (Dkt. 7-11, at 25). Plaintiffs and City

stipulated that the only issue before the Washington Court of Appeals was the alleged violations of RCW 82.02.020 (prohibiting cities from imposing fees or exactions that are disproportionate to the impact of the development). Dkt. 7-11, at 25.

On May 12, 2000, the Court of Appeals granted interlocutory review (Dkt. 7-11, at 27) and on May 4, 2001, issued its decision (Dkt. 7-11, at 29).[1] The Court of Appeals affirmed the trial court's denial of Plaintiffs' Motion for Summary Judgment and remanded to the trial court for further proceedings. Dkt. 7-11, at 29.

On March 28, 2002, Plaintiff filed a Motion for Leave to Amend Complaint. Dkt. 8-2, at 1. The Proposed Amended Complaint would have clarified "the relief requested and more explicitly state[d] the constitutional theories underlying plaintiffs' claims." Dkt. 8-2, at 2. The trial court denied the motion on April 12, 2002. Dkt. 8-2, at 18.

On June 12, 2002, trial commenced (Dkt. 8-4, at 17), and on October 30, 2002 the court issued its decision (Dkt. 8-11, at 14). The court concluded that the GFC that the City imposed on Tapps Brewery, Inc., was invalid. Dkt. 8-11, at 11-12. However, the court concluded that the GFC imposed on the Plaintiffs was not invalid and dismissed their claims with prejudice. Dkt. 8-11, at 11-12.

Plaintiffs filed a Notice of Appeal with the Washington State Supreme Court. Dkt. 8-11, at 18.

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[1] *Tapps Brewing, Inc. v. City of Sumner*, 106 Wash. App. 79, 22 P.3d 280 (2001).

The Washington Supreme Court declined review (Dkt. 9-2, at 20) and transferred the case to the Court of Appeals (Dkt. 9-3, at 1). The Court of Appeals issued an unpublished second opinion, *Tapps II*,[2] on January 25, 2005, reversing and remanding for trial on Plaintiffs' challenge to the pipe upgrade obligation's legality. Dkt. 9-3, at 3. The Court of Appeals also directed that Plaintiffs be allowed to amend the complaint to clarify the constitutional claims. Dkt. 9-3, at 20.

After Plaintiffs amended the complaint (9-4, at 5), the City removed the action to this Court on January 6, 2006 (Dkt. 1-1). This Court denied the Plaintiffs' Motion to Remand on March 3, 2006. Dkt. 18.

The facts giving rise to the procedural history are as follows. In the early 1990's, the City of Sumner experienced severe flooding. Dkt. 48-1,at 2. To solve this problem, the City adopted a Stormwater Comprehensive Plan and accompanying stormwater regulations (Dkt. 48-1, at 2), and the City began reconstructing its drainage system (48-1, at 3). To pay for the construction, the City adopted the Stormwater General Facility Charge ("GFC"), which is calculated using the total amount of impervious surface of the property. Dkt. 48-1, at 3.

Plaintiffs Andrea and Daniel McClung own four adjoining lots on the northwestern corner of Valley and Main streets in the City of Sumner. Dkt. 42-3, at 4. At the time of purchase, a gravel alley ran from east to

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[2] *Tapps Brewing Co., Inc. v. McClung*, No.31959-4-II, 2005 WL 151932 (Jan. 25, 2005).

west at the north end of the lots, separating them from Sumner High School. Dkt 42-3, at 4-5. The Plaintiffs asked the City to vacate the alley, and the City agreed to the vacation in March 1994. Dkt. 42-3, at 6, 8. The City retained a utility easement beneath the alley for a stormwater pipe. Dkt. 42-3, at 8-9.

In May of 1994, the Plaintiffs wished to remodel one of the lot houses into a Subway sandwich shop and convert the vacated alley into a paved parking lot. Dkt. 42-3, at 12-13. They submitted plans to the Sumner Community Development Review Committee on May 19, 1994. Dkt. 42-3, at 12. The City informed Plaintiffs that they would have to install a biofiltration swale to filter the runoff from the new paved parking area. 42-3, at 14.

On September 29, 1995, the City sent Plaintiffs a letter retracting that requirement and instead conditioning approval of the building permit on the installation of a new stormwater line. Dkt. 48-3, at 111. The letter stated, "[t]he existing storm drainage system serving this development and the area along Main Street west of this site is inadequate according to the Stormwater Comprehension Plan of 1992. It states that a 24-inch pipeline is required." Dkt. 48-3, at 111. This letter was issued as a result of a meeting between Daniel Rich, the Plaintiffs' engineer, and Bill Shoemaker, the City's engineer. Dkt. 8-6, at 5.

On October 10, 1995, Mr. Rich and Mr. Shoemaker again met to discuss the drainage system. Dkt. 8-6, at 7. Mr. Shoemaker informed Mr. Rich that the City "dug up the existing storm line near the catch basin . . . . [and] found that the line is only 12" for four feet, then changes to 6"." Dkt. 8-6, at 7. Mr. Rich noted

that the "existing 6" line is essentially worthless as far as meeting the expected flow of 15.2 cfs." Dkt. 8-6, at 7. Mr. Shoemaker also indicated that the "City would probably help with the cost." Dkt. 8-6, at 7.

On December 27, 1995, the City sent another letter to Plaintiffs, explaining that the existing stormwater line (at six inches in diameter) was deficient, and the Plaintiffs' property required a twelve inch diameter pipe per the City's stormwater regulations. Dkt. 48-3, at 114. The City stated, "as a developer, you are required to install a 12-inch storm drain as a minimum." Dkt. 48-3, at 114. The City additionally informed the Plaintiffs through this letter that it wanted them to install a twenty-four inch stormwater line instead of the required twelve-inch line. Dkt. 48-3, at 114. The City made this request because the City's Stormwater Comprehensive Plan called for a pipe with enough capacity to handle a 100-year flood. Dkt. 48-3, at 111. The City informed Plaintiffs that to "offset the cost of the oversizing to meet the City's Comprehensive Plan requirements, the City will waive the storm drainage General Facilities Charge, permit fees, plan review and inspection charges . . . . [amounting] to about $8,000 to $8,500." Dkt. 48-3, at 114. The City further stated, "[i]f you find this acceptable, please proceed with the revisions to the Plan." Dkt. 48-3, at 114. Plaintiffs, assuming that "the terms set out in [the City's] letter of December 27, 1995, as being the terms that [they were] required to comply with to obtain City approval for [their project]," did not respond to the City's letter but instead proceeded to install a twenty-four inch pipe. Dkt. 51-3, at 2.

The pending motions before this Court are the Plaintiff's Motion for Summary Judgment on Federal Takings Issues (Dkt. 42) and the Defendant's Motion for Summary Judgment on All Remaining Claims. (Dkt. 45). As there are no material issues of fact, this Order addresses all remaining claims: (1) violation of the Takings Provision of the Fifth Amendment of the U.S. Constitution pursuant to 42 U.S.C. § 1983; (2) reasonable attorneys fees pursuant to 42 U.S.C. § 1988; (3) violation of Article 1, Section 16 of the Washington State Constitution; and (4) violation of RCW §§ 35.92.025 and 82.02.020.

II. DISCUSSION

A. SUMMARY JUDGMENT STANDARD

Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is

sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.* , 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra)*. Conclusory, non specific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

B. JURISDICTION AND EXHAUSTION OF REMEDIES

The City argues that Plaintiffs' Fifth Amendment takings claim is barred as a matter of law because the Plaintiffs failed to adjudicate readily available state takings procedures and did not exhaust their administrative remedies. The City relies mainly on *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) for the

proposition that Plaintiffs' claim is not ripe until (1) the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue, and (2) the Plaintiff has sought compensation through the procedures the state has provided for doing so. *Id.* at 194. Therefore, the City argues, this Court is deprived of jurisdiction. Dkt. 45-1, at 10.

Plaintiffs respond that *Williamson County* does not apply because *Williamson County* does not require exhaustion of administrative remedies; rather it only requires that "the decision which forms the basis for the owner's compensation claim be final." Dkt. 50-1, at 9. Further, Plaintiffs argue that because their challenge is a facial challenge the *Williamson County* "ripeness" issue does not apply. Dkt. 50-1, at 10. Plaintiffs state, "Exhaustion and ripeness do not apply in a facial illegal exaction because the decision or action which effects the taking is complete and not subject to ongoing regulatory proceedings." Dkt. 50-1, at 10 (citing *Wash. Legal Found. v. Legal Found. of Wash.*, 236 F.3d 1097, 1104 (9th Cir. 2001)).

While "[f]acial challenges are exempt from the first prong of the *Williamson* ripeness analysis because a facial challenge by its nature does not involve a decision applying the statute or regulation," Plaintiffs fail to recognize the dual nature of their claim. *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003). Plaintiffs' claim of an illegal upgrade installation requirement actually consists of two claims, each implicating separate legal authority: (1) the City's enforcement of Ordinance No. 1603 requiring a pipe upgrade from six to twelve inches, and (2) the City's offer to waive fees in

consideration for installation of a twenty-four inch oversized pipe.

1. City's Enforcement of Ordinance No. 1603 – Pipe Upgrade Requirement from Six to Twelve Inches

Sumner Municipal Ordinance No. 1603 expressly adopts the stormwater regulations contained in the "Surface Water Design Manual" published by the King County Department of Public Works Division of Surface Water Management.[3] Dkt. 53-1, at 13, 73. This manual establishes a twelve inch minimum pipe size requirement for new, permitted developments in the City of Sumner. Dkt. 53-1, at 13; Dkt. 48-3, at 99-100. The City states that "the City simply adopted the pipe size and design criteria," and imposed those criteria, which are "applicable to *any* new development in the City," on the Plaintiffs. Dkt. 52, at 3.

Plaintiffs originally cast their claims as "as-applied" claims. Dkt. 53-2, at 82. Plaintiffs later attempt to re-cast their claims as facial or categorical taking claims.[4] Dkt. 50-1, at 10, 19. A claim is a facial

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[3] The ordinance is codified as Sumner Municipal Code § 13.48.590.

[4] If Plaintiffs' claims had been facial claims, Plaintiffs still would have had a heavy burden proving that a taking occurred. Under a facial challenge to land use regulations, the landowner must demonstrate that the mere enactment of the regulation constitutes a taking. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493 (1987); *Peste v. Mason County*, 133 Wn. App. 456, 471-72 (2006). To prove that a statute on its face effects a taking by regulating the permissible uses of property, the landowner must show that the enactment of the regulation denies the owner of all economically viable use of the

challenge where the Plaintiffs' grievance arises solely from the existence of the statute itself; that is, there is no other basis for its challenge. *Hacienda*, 353 F.3d at 656. A facial challenge "by its nature does not involve a decision applying the statute or regulation." *Id.* at 655 (citing *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)). Conversely, an as-applied challenge occurs where the ordinance alone is not the basis for the challenge. *Id.* at 656.

Here, Plaintiffs' claims, despite their attempt to re-cast them, are "as-applied" claims. Plaintiffs' claims, in part, challenge the City's enforcement of Ordinance No. 1603 (requiring that new permitted developments install twelve inch stormwater pipes, if needed) against them.[5] Dkt. 51-1, at 2. Therefore, Plaintiffs' challenge of the six to twelve inch pipe upgrade is an as-applied challenge.

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property. *Keystone*, 480 U.S. at 495; *Peste*, 133 Wn. App. at 472. "A facial challenge in which the court determines a regulation denies all economically viable use of property should prove a rare occurrence." *Guimont v. Clarke*, 121 Wn.2d 586, 606 (1993) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016-18 (1992) (internal quotations omitted).

[5] Plaintiffs state that the motion boils down to the question of whether it is "unconstitutional for a municipality to require a property owner to upgrade a publicly-owned stormwater pipe as a condition to granting a development permit where . . . the upgrade obligation is a unique, administratively determined, discretionary imposition on a single property owner, rather than a generally applicable fee or charge that is legislatively mandated and calculated pursuant to a legislatively prescribed formula." Dkt. 51-1, at 2.

As-applied challenges must meet both prongs of the *Williamson County* ripeness analysis. *Hacienda,* 353 F.3d. at 657. First, Plaintiffs must have obtained a final decision from the entity charged with implementing the regulation. *Id.* at 657. The Plaintiffs need not have resorted beyond the initial decision maker to fulfill the final decision prong. *Id.* Here, the "finality" requirement of *Williamson* does not preclude ripeness because, "[u]nlike *Williamson*, there is no ongoing regulatory proceedings, so there is no occasion, as there was in *Williamson*, to await a final decision." *Wash. Legal Found.*, 236 F.3d at 1104. Further, the ordinance has already been applied to the Plaintiffs, as the December 27, 1995 letter makes clear. Dkt. 48-3, at 114. Plaintiffs have met the first prong of the *Williamson County* test.

Second, under *Williamson County*, the Plaintiffs must have sought and been denied compensation for a deprivation before a taking is complete. *Hacienda*, 353 F.3d at 657. The City argues that Plaintiffs could have requested and received multiple administrative remedies, and their failure to do so deprives them of the opportunity to seek relief from this Court. Dkt. 45-1, at 10. The Plaintiffs argue that it "would be fundamentally unfair" to permit the government to remove this action to federal court and then hold that the Plaintiffs' claim is unripe because the Plaintiffs did not litigate in state court. Dkt. 50-1, at 15. This Court agrees. The City fails to show in the record any statute or code requiring[6] Plaintiffs to exhaust their

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[6] The City directs the Court's attention to several administrative remedies made available to the Plaintiffs through the Sumner Municipal Code. Dkt. 49-1, at 9-12. However, these are remedies

administrative remedies before filing their Fifth Amendment claims in Pierce County Superior Court. Since Plaintiffs have pursued an inverse condemnation action in Washington state court (Dkt. 5-2, at 3), their takings claim regarding the six to twelve inch upgrade is ripe for adjudication in this Court.

2. City's Offer to Waive Fees in Consideration for Installation of a Twenty-Four Inch Pipe

The City's separate authority for upgrading the pipe from twelve to twenty-four inches is found in the City's "Stormwater Comprehensive Plan," adopted pursuant to Ordinance No. 1625. Dkt. 48-1, at 70; Dkt. 48-2, at 96; Dkt. 48-2, at 130. The Stormwater Comprehensive Plan required the City to eventually install a twenty-four inch pipe at Lewis Avenue and Main Street to serve the greater area surrounding Plaintiffs' property. Dkt. 48-2, at 96; Dkt. 48-2, at 130. Pursuant to Sumner Municipal Code § 13.48.610, when it is "deemed necessary by the city, as a condition of development for the developer" to install a pipe that is "larger than required," that developer shall "be eligible for a payback agreement" and the "storm drainage utility may participate in the cost to construct said oversizing upon council approval." Dkt. 53-1, at 13.

Again, the parties make the same *Williamson County* ripeness arguments to the City's offer to waive fees in consideration for installation of a twenty-four

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the Plaintiffs "could have requested and received," not remedies they were required to exhaust before pursuing this action in state court. Dkt. 49-1 at 9.

inch pipe. Dkt. 45-1, at 8-11; Dkt. 50-1, at 9-10. The parties' attempts to apply *Williamson County* creates an unusual dilemma as the challenged ordinance, requiring the installation of a twenty-four inch pipe, applies only to the City, not to the Plaintiffs as the developers. Logically, the Plaintiffs cannot have obtained a "final decision" of the application of the ordinance as required by *Williamson County* because the ordinance was never applied to the Plaintiffs. Since the *Williamson County* ripeness test does not apply here, the Plaintiffs' takings claim regarding the twelve to twenty-four inch upgrade is ripe for adjudication. This opinion will now examine Plaintiffs' claims.

C. FIFTH AMENDMENT TO U.S. CONSTITUTION CLAIM PURSUANT TO 42 U.S.C. § 1983

The final Clause of the Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Fifth Amendment applies to the States as well as the Federal Government. *Chicago B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

"The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings." *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233 (2003) (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321-23(2002)). The Constitution requires payment of compensation whenever the government acquires private property for public purpose, but the Constitution "contains no comparable reference to regulations that prohibit a

property owner from making certain uses of her private property." *Id.* "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County*, 473 U.S. at 194.

The two central questions to be answered in this action are as follows: (1) was there a taking, and (2) if so, was the Plaintiff justly compensated? *See, e.g., Penn Cent. Co. v. City of New York*, 438 U.S. 104 (1978). As noted above, two distinct pipe upgrade obligations are at issue, each requiring a separate analysis.

1. Six to Twelve Inch Upgrade

Plaintiffs argue that this upgrade regulation[7] amounted to an uncompensated taking because while "government may regulate real estate development, it may not use regulation as a pretext to force individual

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[7] Despite the allegations of the Plaintiffs (Dkt. 50-1, at 6), the City possessed the requisite statutory authority to require Plaintiffs to upgrade their pipe from twelve inches to twenty-four inches. Sumner City ordinance No. 1603 authorizes the adoption of the "King County Surface Water Design Manual." Dkt. 53-1, at 13, 73. This manual established twelve inches as the minimum pipe size requirement for any new development in the City of Sumner. Dkt. 52, at 2; . Dkt. 53-1, at 13; Dkt. 48-3, at 99-100. Plaintiffs' development was new development, as they proposed to tear down the existing structure and replace that structure with a commercial building. Dkt. 42-3, at 14. The City's engineer informed Plaintiffs that "as a developer" they were required to install a twelve inch storm pipe as a minimum. Dkt. 48-3, at 114. Although the City failed to mention in its letter the pertinent regulation (Dkt. 48-3, at 114), this fact alone does not strip the City of its authority to impose development regulations

owners to pay for general public improvements when the need for improvements is not caused by those individuals who are forced to pay." Dkt. 42-1, at 11. Therefore, Plaintiffs argue, the City may impose development exactions only when they are reasonably related, both in nature and extent, to the negative impacts of their proposed development pursuant to *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

In *Nollan* and *Dolan*, the Supreme Court established a two-part test for judging when a development exaction goes beyond the legitimate exercise of the government's police powers and becomes an unconstitutional taking. In *Nollan*, property owners appealed a decision of the California Court of Appeals ruling that the California Coastal Commission could condition its grant of permission to rebuild their house on their transfer to the public of an easement across their beachfront property. 483 U.S. at 827. The Supreme Court struck down the exaction as an unconstitutional taking and held that an "essential nexus" must exist between the "legitimate state interest" and the permit condition exacted by the city. *Id.* at 837.

Dolan refined the *Nollan* "essential nexus" test by adding a "rough proportionality" standard. *Dolan* concerned the validity of two land exactions where the City of Tigard required the land owner, Mrs. Dolan, to set aside a portion of her land as a publically accessible greenway and a pedestrian path in exchange for issuing a permit allowing her to enlarge her hardware store and parking lot. 512 U.S. at 379-82. The Supreme Court held that the City of Tigard's

exactions were not constitutional because the City's demands were not roughly proportional to the negative impacts created by the expansion of Mrs. Dolan's store and parking lot. *Id.* at 394.

Plaintiffs argue that the stormwater upgrade lacks the essential nexus and rough proportionality required by *Nollan / Dolan*. Dkt. 42-1, at 14. The City responds by arguing that the *Nollan / Dolan* test applies only to land dedications and does not apply to purely monetary actions like the one at issue here. Dkt. 45-1, at 12.

The Supreme Court has held that where the government regulation "neither physically invades" the property nor denies the owners "all economically viable use of their property" the *Nollan / Dolan* analysis framework does not necessarily apply. *Garneau v. City of Seattle*, 147 F.3d 802,807-08 (1998). Before reaching the question of the proper test, the "first inquiry . . .asks only whether government imposition of the exaction would be a taking." *Id.* at 809. The Court analyzed the distinction in *Garneau*:

> The Court had no trouble in either [*Nollan* or *Dolan*] finding that government imposition of the exaction would amount to a taking. In both cases the government demanded permanent physical occupation of some portion of the applicant's land. Courts have generally found that where government action leads to the physical invasion of private property, it constitutes a per se taking. Similarly, if the government action denies the owner of all economically viable use of his property, it is also a per se taking. By contrast, in non-categorical

> takings cases, courts must undertake complex factual assessments of the purposes and economic effects of government actions. Because of the difference in the Court's approach, much turns on the classification of the government's action.

Id. (internal citations omitted). Therefore, the Plaintiffs must show that the City's imposition of the pipe upgrade constituted a taking. *Id.* at 812.

Here, the six to twelve inch pipe upgrade regulation was not a physical invasion of private property, nor did it deny the owner of all economically viable use of the property. In non-categorical regulatory takings cases, such as the one before the Court, the proper inquiry is "an ad hoc, factual inquiry to determine whether the government regulation goes too far." *Id.* at 807. The most important factors are the economic impact of the regulation on the claimant and the extent to which the regulation has interfered with distinct investment-backed expectations. *Id.* In addition, "the character of the governmental action . . . may be relevant in discerning whether a taking has occurred." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (citing *Penn Transp. Co. v. New York City*, 438 U.S. 104 (1978)) (internal citations omitted).

Here, the Plaintiffs' fail to show that the economic impact is large; at most, the Plaintiffs' costs equal $42,372.02 ($50,872.02, the sum of the engineering services, storm drain construction, soil import and export, and sales tax; minus $8,500, the stipulated amount of the fee waiver). Dkt. 53-1, at 67-70; Dkt. 7-11, at 25. Plaintiffs' overall project entailed demolishing an existing structure and replacing it with

a Subway shop valued at $100,000. Dkt. 48-3, at 104. Plaintiffs have failed to provide reliable evidence in the record, after more than eight years of litigation, of how much a twelve inch pipe upgrade would have cost. The record contains only the Plaintiffs' bill for the six to twenty-four inch pipe upgrade (Dkts. 53-1, at 67, 70) and a City engineer's estimate of the twelve to twenty-four inch pipe upgrade cost (Dkt. 48-1, at 5). Moreover, Plaintiffs have failed to show that the regulation that developers upgrade stormwater pipes to twelve inches (where needed) interfered with "distinct investment-backed expectations." The Plaintiffs' shop has been fully permitted and operation since January of 1997. Dkt. 48-1, at 5.

The character of the government action also indicates that no "takings" occurred. There is no evidence in the record that the City misapplied its regulation requiring a twelve inch pipe, and Plaintiffs fail to produce any evidence showing that the City has not required any other land owner to upgrade the pipe system before granting a permit.

Plaintiffs have shown no diminished rights in the uses of their land and Plaintiffs' have not shown that the commercial use of the parcel has been economically impacted by the requirement to install the twelve inch pipe. Dkt. 48-1, at 5; *see Penn Cent. Transp.*, 483 U.S. at 104 (holding that the law did not affect a taking where the law did not interfere with the owners' present use of the property or prevent them from realizing a reasonable rate of return on their investment).

"[A] party challenging governmental action as an unconstitutional taking bears a substantial burden."

Eastern Enterprises v. Apfel, 524 U.S. 498, 523 (1998). Plaintiffs fail to meet that burden. Therefore, summary judgment in favor of the City as to the six to twelve inch pipe upgrade should be granted, and summary judgment for the Plaintiff should be denied.[8]

2. Twelve to Twenty-Four Inch Upgrade

The twelve to twenty-four inch upgrade has been mis-characterized by both sides. Plaintiffs' attempt to characterize the twelve to twenty-four inch pipe upgrade as a mandatory condition necessary to obtain a building permit is erroneous. The City's letter clearly indicates the fact that the obligation is not the Plaintiffs', but the City's, and the Stormwater Comprehensive Plan adopted by the City establishes that a twenty-four inch pipe was needed at Lewis Avenue and Main Street to serve the greater area around the Plaintiffs' property. Dkt. 48-2, at 96; Dkt. 48-2, at 130. The City, pursuant to Sumner Municipal Code § 13.48.610, offered to pay for the difference in cost between installation of the twelve inch pipe and twenty-four inch pipe by waiving certain fees and charges. Dkt. 53-1, at 13, 66. The City's letter indicates that if the offer was acceptable, the Plaintiffs should proceed with their plan. Dkt. 53-1, at 66. Plaintiffs did not respond to the City's letter, but instead installed the twenty-four inch pipe. Dkt. 51-3, at 2. The City, accordingly, did not impose the fees upon the Plaintiffs. Dkt. 7-11, at 25. Therefore, it

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[8] Plaintiffs also argue that the stormwater exaction imposed on them was not a tax. Dkt. 42-1, at 21. This argument is not relevant to this action.

appears based on the record that the City made an offer, which the Plaintiffs accepted by performance.

Because Plaintiffs have failed to support their burden showing that the City's actions constituted a taking, summary judgment should be granted in favor of the City. Plaintiffs' motion for summary judgment as to this claim should be denied and Defendant's motion for summary judgment as to this claim should be granted. Further, because Plaintiffs have failed to show that the City of Sumner violated their federally protected rights, Plaintiffs' motion for an award of attorney fees under 42 U.S.C. § 1988 should be denied.

D. ARTICLE I, § 16 WASHINGTON STATE CONSTITUTION CLAIM

The Washington State Constitution, like the Fifth Amendment, prohibits the government from taking property from a private owner without paying just compensation, and in some cases provides greater protection than the Fifth Amendment. *Eggleston v. Pierce County*, 148 Wash. 2d 760, 766 (2003). The Washington State Constitution provides in pertinent part the following:

> Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made.

Wash. Const. art. I, § 16. The Washington Supreme Court has established a two-part test applicable to all

claims of regulatory takings of property under Article 1, section 16. The "inquiry asks first whether the challenged regulation protects the public interest in health, safety, the environment or fiscal integrity." *Robinson v. City of Seattle*, 119 Wash. 2d 34, 49 (1992). The second inquiry is "whether the regulation destroys or derogates any fundamental attribute of ownership: the rights to posses exclusively, to exclude others, and to dispose of property." *Id.* at 50. If either inquiry is satisfied, then that regulation is susceptible to a constitutional taking challenge. *Id.* If not, then the regulation is subjected to a *Penn Central* type analysis, where the Court considers the economic impact of the property, the regulation's interference with investment-backed expectations, and the character of the government's action. *Id.* at 51 (citing *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 335-36 (1990)).

The City argues that the Plaintiffs' state law takings claim fails because no Washington Court has held a utility upgrade obligation to be an unconstitutional taking and because Plaintiffs' claims fail to meet the threshold test set out in *Robinson*. Dkt. 45-1, at 16-17. Plaintiffs respond that the non-existence of such a case does not mean the Plaintiffs have no claim; regardless, "a development exaction becomes a taking if it exceeds what is reasonably necessary to mitigate the direct negative impacts of the development." Dkt. 50-1, at 17 (citing *Benchmark Land Co. v. City of Battle Ground*, 103 Wn. App. 721 (2000)).

Here, Plaintiffs have failed to show that the regulation does not protect the public interest or that the regulation destroys any fundamental attribute of ownership. The record shows that the City of Sumner

had experienced severe flooding in the early 1990's, prompting the local government to pass numerous stormwater drainage ordinances. Dkt. 47-1, at 121-40. Also, the pipe upgrade did not destroy a fundamental aspect of Plaintiffs' property ownership; Plaintiffs still enjoy the full use of their land. Last, even if the threshold was met, the same *Penn Central* analysis as applied to the Fifth Amendment claims apply here.[9]

Therefore, the pipe upgrade regulation imposed by the City of Sumner requiring Plaintiffs to install a twelve inch pipe does not effect a taking under the Washington Constitution. In addition, the twelve to twenty-four inch pipe upgrade was an exchange made for consideration, as discussed above, and also does not amount to a taking under the Washington Constitution. To this extent, summary judgment for the Plaintiffs should be denied, and summary judgment for the City should be granted.

E REVISED CODE OF WASHINGTON § 82.02.020

RCW § 82.02.020 prohibits, with certain exceptions, the imposition of "any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of

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[9] *See also, Buttnick v. City of Seattle*, 105 Wn.2d 857 (1986) (holding that the city's requirement that a landowner in a historic preservation district replace a parapet on her building did not amount to an unconstitutional taking given the cost of the replacement and the market value and income producing potential of the building); *Ackerly Commc'ns v. City of Seattle*, 92 Wn.2d 905,919-20 (1979) (holding that an ordinance requiring the removal of signboards along the highways without compensation was not an unconstitutional taking).

residential buildings [or] commercial buildings." The statutory exceptions, found in RCW §§ 82.02.050-.090, do not apply in this case.

The City claims that Plaintiffs are statutorily prevented from raising a claim under RCW § 82.02.020 because Plaintiffs failed to appeal the decision under the Land Use Petition Act ("LUPA"). RCW 36.70C.005-.900. "In order to have standing to bring a land use petition under LUPA, the petitioner must have exhausted his or her administrative remedies . . . . [and] filed for judicial review . . . within 21 days of the issuance of the land use decision." *James v. County of Kitsap*, 154 Wash. 2d 574, 583 (2005) (citing RCW 36.70C.040(3), .060(2)(d)).

Plaintiffs respond that their case fits within one of the exceptions to LUPA. Dkt. 50-1, at 23. RCW 36.70C.030(1)(c) expressly exempts claims for "monetary damages or compensation" from the procedures, standards, and deadlines set forth in LUPA. Therefore, Plaintiffs argue, their claim is subject to a three year statute of limitations, which they satisfy. Dkt. 50-1, at 23.

The Washington Supreme Court recently addressed this issue, holding that the imposition of impact fees as a condition on the issuance of a building permit is a "land use decision" under LUPA and is not reviewable unless a party timely challenges that decision within twenty-one days of its issuance. *James*, 154 Wn.2d at 586-87. The dissent argued that a challenge to the government's decision to issue or withhold a permit is distinct from a challenge to the imposition of illegal fees or taxes. *Id.* at 591-94. However, the majority expressly found that the government's decision to

exact a fee as a condition for granting the developer's building permit constituted a land use decision and not a revenue decision. *Id.* at 583-84.

Accordingly, Plaintiffs claim of a violation of RCW § 82.02.020 is barred under LUPA. To the extent Plaintiffs move for summary judgment on their RCW § 82.02.020 claim, summary judgment should be denied. To the extent the City move for summary judgment on this claim, summary judgment should be granted.

F. REVISED CODE OF WASHINGTON § 35.92.025

RCW § 35.92.025 authorizes cities and towns to charge property owners seeking to connect to the water or sewerage system a reasonable connection fee as a condition to granting the right to connect, so long as the fee represented the property owner's equable share of the cost of the system.

This statute does not apply to this action. The Plaintiffs were already connected to the drainage system. Dkt. 53-1, at 71. The pipe upgrade does not appear to be a "connection" fee thin the meaning of the statute. Moreover, Plaintiffs fail to brief this Court on the issue and do not provide any support for their claim that the City violated this statute. See Dkt. 50-1; Dkt. 51-1.

To the extent Plaintiffs moves for summary judgment on this claim, summary judgment should be denied. To the extent the City moves for summary judgment on this claim, summary judgment should be granted.

III. ORDER

Therefore, it is hereby **ORDERED** that

(1) Plaintiffs' Motion for Partial Summary Judgment on Federal Takings Issues (Dkt. 42-1) is **DENIED**;

(2) Defendant's Motion for Summary Judgment on All Remaining Claims (Dkt. 45-1) is **GRANTED** and the action is **DISMISSED WITH PREJUDICE**; and

(3) The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 16th day of February, 2007.

/s/
RONALD B. LEIGHTON
UNITED STATES DISTRICT JUDGE

APPENDIX D

PLAINTIFFS' EX. ____
NO. 98-2-06522-8

Exhibit 1

ORDINANCE NO. 1620

CITY OF SUMNER, WASHINGTON

AN ORDINANCE vacating a portion of the easterly extension of the W.E. Daniel County Road.

WHEREAS, Daniel W. McClung and Andrea M. McClung, husband and wife, and Sumner School District No. 320 filed a petition with the City Clerk to vacate the hereinafter described portion of the easterly extension of W.E. Daniel County Road, as more particularly set forth herein; and

WHEREAS, on January 3, 1994, the City Council adopted Resolution No. 808, declaring its intent to vacate the hereinafter described portion of the easterly extension of the W.E. Daniel County Road and affixed Monday, February 7, 1994, at the hour of 7: 30 p.m., at the City Hall, 1104 Maple Street, Sumner, Washington, as the time and place when and where said resolution to vacate would be heard and determined; and

WHEREAS, pursuant to RCW 35.79.020, notices of the time and place of the hearing were properly given; and

WHEREAS, at the time and place fixed, the resolution was duly heard; and

WHEREAS, all steps and proceedings required by law and by resolution of the City Council to vacate the hereinafter described portion of the easterly extension of the W.E. Daniel County Road, having been duly taken and carried out; now, therefore,

THE CITY COUNCIL OF
THE CITY OF SUMNER, WASHINGTON

DO ORDAIN AS FOLLOWS

Section 1. That the following portion of the easterly extension of the W.E. Daniel County Road, situated in the City of Sumner, County of Pierce, State of Washington, described in Exhibit "A", which is attached hereto and made a part hereof, is hereby vacated, subject to the conditions set forth in Section 2; provided, that the City hereby retains an easement for public utilities and services under, through and across the above-described real property, together with the right of ingress and egress thereto for the construction, repair and maintenance of said utilities and services, and further retains and reserves an easement for ingress and egress for emergency police and fire vehicles over and across the above-described real property.

Section 2. The above-described property is vacated subject to the following conditions:

BEST AVAILABLE COPY

1. The recording of a lot line adjustment to consolidate into a single parcel the four (4) parcels owned by Daniel W. McClung and Andrea M. McClung.

2. The abandonment of all driveways onto Main Street from the property of Daniel W. McClung and Andrea M. McClung and the restoration of curbs and sidewalks.

3. The provision that all garbage service to the property of Daniel W. McClung and Andrea M. McClung be from the back side of said property and not from Main Street or Valley Avenue. Enclosures for garbage shall be located off the vacated street and access shall be designed to accommodate garbage vehicles.

4. All access points to the property so vacated be improved to City driveway approach standards.

5. The dedication by Daniel W. McClung and Andrea M. McClung to the City of Sumner of twelve feet (12') as additional right-of-way on Main Street; provided, however, that Daniel W. McClung and Andrea M. McClung shall be allowed to occupy the buildings presently located within said twelve feet (12') until such time as the City utilizes said twelve feet (12') for the improvement of Main Street.

Section 3. The land so vacated, is hereby surrendered and attached to the property abutting thereto as a part thereof, and all right or title of the City and of the public, in and to that portion of said road so vacated, shall and does hereby vest in the

owners of said abutting property as provided by RCW 35.79.040.

Section 4. This ordinance shall be null and void unless all of the conditions set forth in Section 2 are completed within six (6) months from the date of this ordinance.

Passed by the City Council and approved by the Mayor of the City of Sumner, Washington, at a regular meeting thereof this 21st day of March, 1994.

/s/ _____
Mayor

Attest:

/s/ Barbara J. Hughes
City Clerk

Approved as to form:

/s/ _____
City Attorney

[On page 52a of this appendix shading has been added to show emphasis]

APPENDIX E

PLAINTIFFS' EX. _____
NO. 98-2-06522-8

PLAINTIFF'S EXHIBIT NO. 2

City of Sumner
1104 Maple Street
Sumner, Washington 96390

(206) 863-8300

December 27, 1995

Dan Mc Clung
P.O. Box 307
1911 Main Street
Sumner, WA 98390

RE: Main Street Plaza and Subway Shop Development

Dear Mr. McClung:

To correct existing deficiencies, meet the needs of your development and satisfy the future requirements as outlined in the Storm Water Comprehensive Plan, a 24 inch diameter storm drain is to be installed as a condition of development. It will discharge into the 36-inch CMP storm drain on the east side of Valley Avenue. Ultimately, this storm drain will be extended to the high point on Main Street just east of Wood

Avenue at the west boundary of the School property. For the present, a 21-inch diameter stub shall terminate at the west line of Parcel "F". A red-line set of your Plans showing the layout was previously submitted to you.

As a developer, you are required to install a 12-inch storm drain as a minimum. My estimate shows the cost difference between a 12-inch and 24-inch diameter pipe ranges from $7,200 to $7,500. To offset the cost of the oversizing to meet the City's Comprehensive Plan requirements, the City will waive the storm drainage General Facilities Charge, permit fees, plan review and inspection charges of the storm drainage systems for both the development and the Subway Shop. These charges amount to about $8,000 to $8,500 depending on the exact GFC for the Subway Shop and time spent on inspection. For this consideration, you will have your Engineers prepare the drawings and your contractor construct the storm drain. If you find this acceptable, please proceed with the revisions to the Plans.

Respectfully yours,

/s/ William J. Shoemaker

William J. Shoemaker, P.E.

cc: Mike Wilson, City Administrator
Les MacDonald, PW Director

[On page 55a of this appendix shading has been added to show emphasis]

APPENDIX F

PLAINTIFFS' EX. ____
NO. 98-2-06522-8

PLAINTIFF'S EXHIBIT 3

MEMORANDUM

TO: Les MacDonald - Mike Wilson

FM: Bill Shoemaker /s/

SUBJECT: Construction of 24-inch storm drain in accordance with Comprehensive Plan as condition of development of McClung's Main Street Plaza

DATE: December 7, 1995

The existing storm drainage pipe through this development at the intersection of Valley Avenue and Main street is only a 6-inch. Plugging of this line has caused water to pond in the School's parking lot to the north twice this Fall. This backup has resulted in the filing of one damage claim. Replacement of this pipe is needed whether McClung develops or not. The additional contribution of storm water due to the development is small. The development creates only an additional 3,800 sq. ft. of impervious area.

The Storm Water Comprehensive Plan calls for an upgrade to a 24-inch main (required capacity is 15.2

cfs) to serve this drainage basin to the west and south including about half of the High School complex. McClung is asking the City to participate in the cost of this storm drain. The cost of constructing the required 350 feet of 24-inch main across his property is estimated to range between $24,000 and $28,000. Attached is a draft of a letter and offer that I believe he will accept. In my opinion, this would be an equitable arrangement for both parties.

Please let me know if you agree with my assessment and would recommend such action to the Council.

APPENDIX G

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

No. 98-2-06522-8

[Filed June 17, 2002]

TAPPS BREWING, INC., a Washington corporation, and DANIEL McCLUNG and ANDREA McCLUNG, individually and as a marital community,	)
Plaintiffs,	)
vs.	)
CITY OF SUMNER,	)
Defendant.	)

VERBATIM RECORD OF PROCEEDINGS
June 13, 2002
Tacoma, Washington

* * *

[p.13] * * *

Q [Mr. Severson] Now, do you have an understanding of who owns that storm water pipe in the easement?

A [Mr. Shoemaker] Yes

Q [Mr. Severson] Who could that be?

[p.14] **A** [Mr. Shoemaker] The city.

* * *

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No. 08-1102

FILED
MAY 4 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

DANIEL AND ANDREA MCCLUNG,
Petitioners,

v.

CITY OF SUMNER, WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

BRETT C. VINSON
CITY ATTORNEY
1104 Maple Street
Suite 242
Sumner, Washington 98390
(253) 299-5610

MICHAEL C. WALTER
Counsel of Record
KEATING, BUCKLIN &
MCCORMACK, INC., P.S.
800 Fifth Avenue
Suite 4141
Seattle, Washington 98104
(206) 623-8861

May 4, 2009

QUESTION PRESENTED

In response to historic flooding in the early 1990s, the Sumner City Council engaged in comprehensive stormwater management planning. After undertaking detailed technical studies and holding a series of public meetings, the City Council adopted ordinances in 1993 and 1994 to establish generally applicable minimum stormwater infrastructure requirements for all new developments. When petitioners sought a permit for extensive new development in 1994, these requirements were applied to their proposed project, obligating petitioners to install stormwater pipe with greater carrying capacity than the existing pipe. No dedication of real property was required of petitioners. Petitioners neither objected to the stormwater pipe upgrade requirements nor sought to mitigate the financial impact of these requirements through the several mechanisms made available in the City Code. The question presented is:

When generally applicable, legislatively enacted land use regulations not involving land dedications are applied to developments of real property without individualized tailoring through adjudication, is a takings challenge to those regulations properly evaluated using the factors articulated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978)?

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TABLE OF AUTHORITIES

CONSTITUTIONS, STATUTES, AND REGULATIONS

STATEMENT

Particularly severe rains between 1990 and 1992 caused widespread flooding in Sumner, Washington. *See* Pet. App. 4a-5a, 28a. To solve the flooding problem, the City (respondent) undertook several technical studies and held a series of public hearings in order to craft a comprehensive stormwater management strategy. The resulting Comprehensive Stormwater Plan had three distinct components. The first was respondent's commitment to construct a stormwater drainage trunk line to collect and transmit stormwater runoff from a large service area in East Sumner (an area that includes petitioners' property). The trunk line was financed by more than $3 million in bonded indebtedness to be repaid over 20 years. Respondent adopted the Stormwater General Facility Charge ("GFC"), which is calculated according to the total amount of impervious surface on each parcel, to pay for the construction. *See id.* at 28a. The second component of respondent's comprehensive strategy to address flooding was to revise the City Code to require that all new developments be served by stormwater pipes with a minimum 12-inch diameter. *See id.* at 5a. The third and final component of the comprehensive plan was to outline a strategy for upgrading certain stormwater pipes in key parts of the City to pipes with 18-, 21-, and 24-inch diameters. *See id.*

In 1993 and 1994, respondent officially adopted the Comprehensive Stormwater Plan by enacting Ordinances Nos. 1603 and 1625. *See id.* at 5a, 11a n.3, 28a, 37a. Ordinance No. 1603, now codified at section 13.48 of the Sumner Municipal Code, expressly adopted the King County Surface Water Design Manual ("Water Design Manual") as applicable to all

new development in the City. This Manual, which is used by many local jurisdictions in Western Washington, establishes the minimum stormwater pipe size as 12 inches in diameter for all new development in the City. It also recommends future upgrades to 18-, 21-, or 24-inch stormwater lines underneath properties in East Sumner to ensure proper and effective drainage of that area. Ordinance No. 1625 – the Comprehensive Plan for the City of Sumner, adopted in April 1994 – ratified and codified the City's Comprehensive Stormwater Plan as part of the overall comprehensive planning document.

Petitioners Daniel and Andrea McClung own several lots in East Sumner. In May 1994, petitioners approached respondent about their plans to develop a commercial project known as "Main Street Plaza." *See* Pet. App. 5a. These plans – encompassing the four houses located on petitioners' East Sumner parcel – called for the demolition of one of the houses, the construction of a Subway sandwich restaurant in its place, and the conversion of a gravel alleyway at the rear of the parcel into an asphalt parking area. *See id.* Paving the alleyway would add impervious surface cover, exacerbating the stormwater runoff problem.

Before approving petitioners' building permit, the City discovered that the stormwater pipe serving petitioners' property was 12 inches in diameter for the first four feet, and then only six inches in diameter for more than 350 feet. *See id.* The six-inch pipe did not comply with the Water Design Manual provisions adopted by Ordinance No. 1603, which required a *minimum* pipe size of 12 inches for all new development in Sumner. *See id.* Moreover, the Comprehensive Stormwater Plan called for further upgrades

to 24-inch pipe in this area of East Sumner to handle large-area drainage problems and to address future flooding issues in the area. *See id.* at 29a.

On December 27, 1995, respondent sent petitioners a letter explaining that the existing stormwater line was deficient and that "[a]s a developer you are required to install a 12-inch line at a minimum." *Id.* at 56a. Respondent further noted that the Comprehensive Stormwater Plan required upgrading the pipe to 24 inches. Respondent did not require petitioners to pay the cost of upgrading to the 24-inch line. Rather, it offered to fully offset the cost of upgrading from a 12-inch to a 24-inch line by waiving certain generally applicable development fees. *See id.* ("To offset the cost of the oversizing to meet the City's Comprehensive Plan requirements, the City will waive the storm drainage General Facilities Charge, permit fees, plan review and inspection charges of the storm drainage systems for both the development and the Subway Shop."). Petitioners did not respond to respondent's letter and proceeded to install a 24-inch pipe. *See id.* at 30a; *see also id.* at 6a (explaining that petitioners "voic[ed] no objection to the 24-inch pipe installation requirement"). Respondent waived the applicable GFC charges and fees, as promised. Petitioners subsequently completed the rest of the permitting and construction process, as well as their Main Street Plaza project, and the development has been open and operational for nearly 13 years.

On April 27, 1998, petitioners filed suit in Washington state court asserting violations of Washington state law. *See id.* On September 3, 1999, they filed a motion for summary judgment asking the trial court to determine as a matter of law that the GFC

imposed on them by the City was an illegal charge under the Revised Code of Washington. Petitioners' motion was denied on October 1, 1999. *See id.*

On November 1, 1999, petitioners sought discretionary review of the trial court's denial of their summary judgment motion. The Washington Court of Appeals denied the request. *See id.* at 26a. Petitioners filed a motion to modify the court's ruling on April 11, 2000. Respondent entered into a stipulation with petitioners agreeing that "the only issue before the Washington Court of Appeals was the alleged violations of Revised Code of Washington 82.02.020." *Id.* at 26a, 27a. On May 4, 2001, the court of appeals affirmed the trial court's denial of petitioners' motion for summary judgment and remanded to the trial court for further proceedings.

On March 28, 2002, four years after they filed their original complaint, petitioners filed a motion to amend their complaint. The proposed amendment sought to add, for the first time, federal and state takings claims, as well as civil rights and attorney's fees claims under 42 U.S.C. § 1983 and § 1988. The proposed amended complaint, also for the first time, demanded damages in excess of $50,000. The trial court denied the proposed amendment on April 12, 2002. A bench trial commenced on June 12, 2002, and at trial petitioners attempted to relitigate the legality of the City's stormwater GFC, claiming that the Washington Court of Appeals' decision denying summary judgment for petitioners was erroneous. Petitioners also challenged the legality and constitutionality of the stormwater pipe upgrade obligation. The trial court rejected these arguments and limited the issue at trial to whether respondent's stormwater GFC was discriminatory as applied to petitioners.

At the conclusion of the bench trial, on October 22, 2002, the Pierce County Superior Court ruled in respondent's favor, concluding in pertinent part that: (1) the City had authority to impose the stormwater GFC under Chapter 35.67 of the Revised Code of Washington; (2) the stormwater GFC as applied to petitioners complied with Chapter 35.67; (3) the stormwater pipe upgrade obligations imposed on petitioners were not stormwater GFC charges; and (4) petitioners' claims should be dismissed. Final judgment was entered on October 30, 2002, dismissing petitioners' claims with prejudice.

Petitioners sought direct review in the Washington Supreme Court (bypassing the court of appeals). The Washington Supreme Court declined review and transferred the case to the court of appeals. *See* Pet. App. 28a. The court of appeals issued an unpublished second opinion, *Tapps Brewing Co. v. City of Sumner*, No. 31959-4 II, 2005 WL 151932 (Jan. 25, 2005), reversing and remanding to the trial court for consideration of petitioners' challenge to the legality of the stormwater pipe upgrade obligation. *See* Pet. App. 28a. The court of appeals also directed that petitioners be permitted to amend the complaint to clarify the constitutional claims. *See id.*

On January 16, 2006, the City timely removed the case to federal court. Petitioners then filed "Plaintiff's Motion for Summary Judgment on the Federal Takings Issues." *See id.* at 31a. Respondent sought summary judgment on all remaining claims. On February 16, 2006, the district court entered its order granting respondent's motion for summary judgment and denying petitioners' partial summary judgment motion on the federal takings claim.

Judgment based upon that order was entered on February 21, 2007.

Petitioners appealed the district court's order to the Ninth Circuit. Their argument on appeal was limited solely to the alleged unconstitutionality of the stormwater upgrade condition under the Fifth Amendment to the United States Constitution. *See* Appellants' Opening Brief, *Tapps Brewing Inc. v. City of Sumner*, No. 07-35231 (9th Cir. filed Sept. 25, 2008) (making no state-law argument and citing no state cases concerning the constitutionality of the stormwater upgrade obligation).

On September 25, 2008, the Ninth Circuit affirmed. The court assumed without deciding that petitioners' federal takings claim was ripe, *see* Pet. App. 10a, and held that respondent's legislatively adopted and generally applicable requirement that all new development be conditioned on the installation of 12-inch stormwater pipes should be analyzed under the standard articulated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), *see* Pet. App. 10a-19a. The Ninth Circuit also affirmed the district court's conclusion that petitioners had "impliedly contracted to install a 24-inch pipe." *Id.* at 19a.

On December 1, 2008, the Ninth Circuit denied petitioners' motion for rehearing *en banc*. *See id.* at 3a.

REASONS FOR DENYING THE PETITION

Petitioners' primary argument in support of their petition for a writ of certiorari is that the decision below misapplies a settled Supreme Court precedent and conflicts with a 2004 decision of the Texas Supreme Court. *See* Pet. 8-12. Even if petitioners' claims were correct, the decision below would not warrant this Court's review. In fact, however, petitioners are wrong on both counts.

A. The lower courts are in widespread agreement about the application of the Fifth Amendment to generally applicable development conditions.

1. The Ninth Circuit's interpretation and application of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), is correct. *Dolan* expanded on this Court's holding in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), that land-use exactions imposed as conditions on development permits must bear an essential nexus to legitimate government interests implicated by the proposed development. In *Dolan*, this Court addressed the question reserved in *Nollan*: "what is the required degree of connection between the exactions and the projected impact of the proposed development[?]" *Dolan*, 512 U.S. at 386. In adopting the rough-proportionality standard, the Court held that the city's demand that Dolan "deed portions of [her] property to the city" for a public greenway and pedestrian/bicycle pathway as conditions on her building permit were unconstitutional takings because the city had not demonstrated that the land exactions were roughly proportional to the burdens imposed by the proposed development. *Id.* at 385, 391. The Court made clear that the facts of *Dolan*

were different from traditional takings cases in two important respects:

> First, [traditional takings cases] involve[] essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of her property to the city.

Id. at 385.

This Court reaffirmed the importance of the second of these distinctions in *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687 (1999). In that case, the Court explained, "we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use." *Id.* at 702.

The infrastructure upgrade at issue in this case, in contrast to the one at issue in *Dolan*, shares neither of these distinguishing characteristics. It is legislative in nature, not adjudicative, having been imposed as a result of a blanket legislative determination applicable to all new development in the City. As the court below stated, "the McClungs attempt to recast the facts as involving an individualized, discretionary exaction as opposed to a general requirement imposed through legislation. . . . The facts do not support the McClungs falling within the former category." Pet. App. 18a. And it does not require petitioners to deed any portion of their property to the City or dedicate any portion of their property to

public use.[1] Thus, the decision below cannot possibly represent a misapplication of the settled *Dolan* rule.

2. The judgment below does not conflict with the decision of the Texas Supreme Court in *Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 (Tex. 2004). In *Town of Flower Mound*, the Texas Supreme Court applied *Dolan*'s rough-proportionality standard to a permit condition requiring the developer to improve a public street adjacent to its proposed development. After considering the town's argument that *Dolan* should not apply because the street improvement requirement was legislative rather than adjudicative in nature, the Texas Supreme Court expressly declined to decide whether legislatively imposed conditions are subject to *Dolan*'s rough-proportionality standard. *Id.* at 641 ("[w]e need not risk error . . . by undertaking to decide here in the abstract whether the *Dolan* standard should apply to all 'legislative' exactions"). Instead, the court determined that the *Dolan* standard was applicable in that case because the condition was essentially adjudicative in nature – having been imposed "based on general authority taking into account individual circumstances." *Id.* In particular, "the Town was authorized to grant, and did grant,

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[1] The stormwater pipe upgraded by petitioners runs through an easement retained by the City when it vacated the alley for petitioners' benefit. The vacation of the alley and the easement in favor of the City were accomplished through Ordinance No. 1620, adopted by the Sumner City Council on March 21, 1994. *See* Pet. App. 51a-54a. The existence of the easement thus predated the permit application and the consequent requirement that petitioners upgrade the pipe to 12 inches. Accordingly, this case does not involve a dedication of private real property to public use.

exceptions to the general requirement that roads abutting subdivisions be improved to specified standards. [The developer] applied for an exception and was refused, but the Town nevertheless considered whether an exception was appropriate." *Id.*

In contrast, the upgrade requirement imposed on petitioners – a City-wide development requirement promulgated by the Sumner City Council after public debate and deliberation – is quintessentially legislative in nature. The Sumner Municipal Code ("SMC") requires that "[s]tormwater management measures . . . be designed and constructed in accordance with the standards and specifications as set forth in *Surface Water Design Manual* published by King County." SMC 13.48.590. The Water Design Manual, in turn, mandates a minimum 12-inch stormwater pipe size for every new or modified development in the City of Sumner.

Moreover, petitioners failed to seek a variance from the general requirement or to avail themselves of any of the mechanisms by which the minimal financial burden of the general requirement could be mitigated. Under the Sumner City Code, the City engineer is authorized to grant a variance from any of the standards contained in the Manual "if there are exceptional circumstances applicable to the site such that strict adherence to the provisions of these regulations will result in unnecessary hardship and not fulfill the intent of this chapter." SMC 13.48.480. In addition, the SMC contains several provisions permitting developers to seek payments from other property owners designed to offset any potential financial burdens of complying with the minimum 12-inch pipe requirement.

For example, SMC 13.48.500(D) establishes a right to enter into a "latecomer's agreement," which is "an agreement between the city and a property owner for the sole purpose of reimbursing such owner for costs incurred by that owner for the installation of a public storm drainage system." Similarly, SMC 13.48.610 *requires* the City to allow a developer to enter into a payback agreement under SMC 13.48.500(D) when its development is conditioned on the installation of stormwater conveyance lines "larger than required to serve adjacent properties." The payback agreement compels other property owners to share in the cost of the upgrade. *See* SMC 13.40.070. Finally, in some circumstances in which a developer is asked to install pipes larger than necessary to serve adjacent properties, the City's stormwater drainage utility will contribute to the cost of constructing the upgrade. *See* SMC 13.48.610. Petitioners failed to pursue *any* of these mechanisms for individualizing the application of the general 12-inch pipe requirement to the particularities of their property or development plans. Because this case does not involve a condition "based on general authority taking into account individual circumstances," *Town of Flower Mound*, 135 S.W.3d at 641, the decision below does not conflict with the Texas Supreme Court's decision in *Town of Flower Mound*.

3. Petitioners' attempt to bolster their claim of a split among the lower courts with a long stringcite of allegedly conflicting cases buried in footnote 7 is also unavailing. Remarkably, four of the six lower court cases cited in that footnote are decisions by intermediate appellate state courts (and two are from intermediate courts in the same state). *See Benchmark Land Co. v. City of Battle Ground*, 14 P.3d 172

(Wash. Ct. App. 2000), *aff'd on other grounds*, 49 P.3d 860 (Wash. 2002); *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380 (Ill. App. Ct. 1995); *United Dev. Corp. v. City of Mill Creek*, 26 P.3d 943 (Wash. Ct. App. 2001); *Schultz v. City of Grants Pass*, 884 P.2d 569 (Or. Ct. App. 1994). Even if those decisions could be said to conflict with the decision below, they would not establish any conflict of authority warranting certiorari.[2]

And, while the two remaining cases in footnote 7 of the petition are decisions of state courts of last resort, one predates *Nollan* and *Dolan* and both rest on their respective state constitutions, not the Fifth Amendment to the federal Constitution. *See Simpson v. City of North Platte*, 292 N.W.2d 297, 299 (Neb. 1980) ("the ordinance is in violation of the Nebraska Constitution"); *Northern Illinois Home Builders Ass'n v. County of Du Page*, 649 N.E.2d 384, 389 (Ill. 1995) (applying the "specifically and

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[2] Moreover, in attempting to establish a conflict of authority, petitioners mischaracterize the holdings of these intermediate court decisions. For example, petitioners claim that the Appellate Court of Illinois subjected a legislative determination to *Nollan/Dolan* scrutiny in *Amoco Oil*. Pet. 10 n.7. The court itself, however, stated that "the so-called 'ordinance' at issue here did not itself reflect a uniformly applied legislative policy. Indeed, the dedication requirement was clearly site-specific and adjudicative in character." 661 N.E.2d at 390. Similarly, petitioners rely on *Benchmark Land*. However, in that case the Washington Supreme Court reversed and remanded in light of this Court's decision in *City of Monterey*. After the Washington Court of Appeals applied *Nollan/Dolan* scrutiny again, the Washington Supreme Court ruled that the required street upgrade was invalid under the applicable state statute and declined to reach the constitutional issue. *See Benchmark Land Co. v. City of Battle Ground*, 49 P.3d 860 (Wash. 2002).

uniquely attributable" test under the state constitution).[3]

4. Indeed, in trying to demonstrate the existence of a deep conflict involving many courts, petitioners even overstate the extent to which lower courts *agree* with the decision below. Of the five cases cited in footnote 8 of the petition, only two involve holdings that directly address the question whether *Nollan/Dolan* scrutiny applies to purely legislative enactments. In *San Remo Hotel L.P. v. City & County of*

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[3] *Amici* Pacific Legal Foundation, The Cato Institute, and the Building Industry Association of Washington fare no better in their attempt to establish a split of authority. Six of the seven cases cited by *amici* in support of the proposition that some lower courts apply *Nollan/Dolan* scrutiny to legislative enactments (in conflict with the decision below) are entirely off-point. One case involves the fact-bound application of state law. *See City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995) ("This contract action came before the district court in exercise of its diversity jurisdiction."). Another applied a state constitutional standard. *See Northern Illinois Home Builders Ass'n*, 649 N.E.2d at 389 (applying the "specifically and uniquely attributable" test). A third involved dedication of an interest in real property, which *Dolan* makes clear presents distinct issues from other types of conditions. *See Curtis v. Town of South Thomaston*, 708 A.2d 657, 659-60 (Me. 1998) (applying *Dolan* to the requirement that developers construct a fire pond and grant the city a permanent easement to access the pond for fire suppression purposes). In the fourth case, the New York Court of Appeals invalidated a rent stabilization program for the benefit of employees of Lenox Hill Hospital because it did not substantially advance a legitimate state interest. *See Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 483 (N.Y. 1994) ("[w]e conclude that chapter 940 fails the test of substantially advancing a legitimate State interest"). Two cases involve particularized, adjudicatively imposed conditions. *See Trimen Dev. Co. v. King County*, 877 P.2d 187, 194 (Wash. 1994) ("King County's assessment of fees in lieu of dedication are specific to the site"); *see also Town of Flower Mound*, *supra*.

San Francisco, 41 P.3d 87 (Cal. 2002), the California Supreme Court declined to apply *Nollan/Dolan* to the city's residential hotel conversion and demolition ordinance ("HCO"), concluding that the "'sine qua non' for the application of *Nollan/Dolan* scrutiny is . . . the 'discretionary deployment of the police power' in 'the imposition of land-use conditions in individual cases.'" *Id.* at 105. Because "[t]he HCO is generally applicable legislation . . . that . . . applies, without discretion or discrimination, to every residential hotel in the city" and therefore "does not provide City staff or administrative bodies with any discretion as to the imposition or size of a housing replacement fee," the court declined to subject it to *Nollan/Dolan* scrutiny. *Id.* at 104.

Similarly, in *Parking Association of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), an association of companies managing or owning surface parking lots in the city brought action against the city, seeking declaratory and injunctive relief, challenging the constitutionality of a city zoning ordinance requiring curbs, landscaping, and trees in surface parking lots. The Georgia Supreme Court held that *Dolan* was inapplicable because "[h]ere the city made a legislative determination with regard to many landowners and it simply limited the use the landowners might make of a small portion of their lands" in contrast to the "individualized determination" at issue in *Dolan*. *Id.* at 203 n.3.

The other three cases cited in footnote 8 of the petition do not directly address the application of *Nollan/Dolan* scrutiny to generally applicable development conditions. *See Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 930 P.2d 993, 999-1000 (Ariz. 1997) ("In light of our holding that the reason-

ableness of the amount of the Scottsdale fee was not raised in the trial court, whether that fee is roughly proportional to the burden imposed on the community was likewise not in question."); *McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995) (rejecting the application of *Dolan* to the city's trafficway improvement impact fee because "it does not appear that the issue was presented to the district court"); *City of Olympia v. Drebick*, 126 P.3d 802, 806, 808 (Wash. 2006) (declining to look to *Nollan/Dolan* to determine "what the legislature intended when it required that the facilities funded by the impact fees be *reasonably related and beneficial* to the particular development seeking approval").

The unavoidable fact is that state courts of last resort and courts of appeals simply have not addressed whether *Nollan/Dolan* scrutiny applies to generally applicable development conditions in sufficient number to establish any meaningful pattern, and the few that have addressed the issue are in substantial agreement. Until more lower courts weigh in, and unless the pattern that emerges demonstrates an irreconcilable split of authority, this Court's review is not warranted.

B. This case does not involve a monetary exaction, and therefore does not implicate any split of authority that might exist regarding the application of the Fifth Amendment to purely monetary exactions.

Having failed to establish the existence of a split of authority on the issue of legislative exactions, petitioners attempt to shoehorn this case into another area of Fifth Amendment jurisdiction where

they allege a conflict. Not only does the case not fit, but the alleged conflict is overstated.

1. Petitioners assert that, "[a]s an alternative ground for its holding, the Ninth Circuit ruled that heightened scrutiny does not apply to monetary exactions." Pet. 13. In fact, the Ninth Circuit plainly stated: "[w]e further reject the McClungs' characterization of Ordinance 1603 as creating a monetary exaction." Pet. App. 17a.[4] Thus, even if petitioners could establish a division of authority on the second question presented in the petition, the decision below would not implicate that conflict.[5]

2. Petitioners also overstate the extent of any lower court disagreement concerning the application of the Fifth Amendment to monetary exactions, and they confuse and mischaracterize the holdings of the cases they cite in support of their claim that the lower courts are divided.

a. Petitioners cite only four cases from courts of appeals or state courts of last resort in support of their claim that "[m]ost courts . . . disagree" with the proposition that *Nollan/Dolan* scrutiny "does not apply to monetary exactions," Pet. 13, and two of those cases are completely inapposite. In *Rose Acre*

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[4] While the court below went beyond this finding and offered its opinion that "even if the upgrade could be viewed as a monetary exaction . . . *Nollan/Dolan* still would not apply," Pet. App. 17a, this observation was not necessary to the decision below (indeed, it was counterfactual), and therefore the case does not provide an appropriate vehicle for reaching the issue presented by the second question.

[5] Because this case does not involve a monetary exaction, it also does not implicate the question presented in *Empress Casino Joliet Corp. v. Alexis Giannoulias, Treasurer of Illinois*, No. 08-945, which is currently pending before this Court.

Farms, Inc. v. United States, 373 F.3d 1177 (Fed. Cir. 2004), for example, the Federal Circuit did not address a monetary exaction. Rather, the challenged restriction there arose from a United States Department of Agriculture regulation designed to address the threat of salmonella in table eggs. As a result of the regulation, eggs from Rose Acre Farms were diverted from the table egg market to the breaker egg market for a period of 21 months, resulting in a loss of income.[6] The Federal Circuit appropriately analyzed that restriction on the use of property under the *Penn Central* factors. The court did not even mention monetary exactions or *Nollan/Dolan*.

Nor did *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), involve the application of *Nollan/Dolan* to monetary exactions. *Anderson* involved multifaceted constitutional challenges to many provisions of Kentucky election law, one of which required political campaigns to turn over unexpended funds to the Commonwealth at the end of the campaign. The Sixth Circuit addressed the takings issues raised by that provision in one paragraph, concluding that the turn-over requirement constituted a *per se* taking under *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003). *Nollan/Dolan* played no part in the decision of that case.

That leaves just two cases standing in supposed support of petitioners' claim that "[m]ost courts" have applied *Nollan/Dolan* to monetary exactions. *See Town of Flower Mound, supra*; *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996). Both of these

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[6] Table eggs are consumed without pasteurization, while breaker eggs are used for products that are pasteurized before being sold. *See Rose Acre Farms*, 373 F.3d at 1181.

remaining cases stand for the proposition that some monetary exactions – in particular, "special, discretionary permit conditions [imposed] on development by individual property owners" – are subject to *Nollan/Dolan* scrutiny. *Ehrlich*, 911 P.2d at 447 ("[W]hen a local government imposes special, discretionary permit conditions on development by individual property owners – as in the case of the recreational fee at issue in this case – *Nollan* and *Dolan* require that such conditions, whether they consist of possessory dedications or monetary exactions, be scrutinized under the heightened standard."); *Town of Flower Mound*, 135 S.W.3d at 640-42 (applying *Nollan/Dolan* scrutiny because the exaction at issue in that case was individualized, not "legislative").

b. The lower courts are not in disagreement over the proposition at issue in *Ehrlich* and *Town of Flower Mound* that takings challenges to individualized monetary exactions imposed adjudicatively as permit conditions on particular development proposals should be analyzed under the heightened standards articulated in *Nollan/Dolan*. As discussed above, the decision below does not conflict with *Town of Flower Mound* or *Ehrlich* because this case does not involve a monetary exaction, notwithstanding petitioners' attempts to characterize it as such. Nor do the other cases cited by petitioners support their claims of a conflict. The three principal cases they cite for the proposition that "[s]ome courts . . . *suggest* that *Nollan/Dolan* scrutiny does not apply to monetary exactions,"[7] Pet. 13 (emphasis added), are all

[7] The strength of petitioners' evidence of a disagreement among lower courts is belied by their use of the verb "suggest." Pet. 13.

from the Ninth Circuit, as is the decision below. These cases do not conflict with the holdings in *Town of Flower Mound* and *Ehrlich*. Rather, the Ninth Circuit's established jurisprudence is completely consistent with the proposition that *Nollan/Dolan* scrutiny is applicable to individualized, adjudicative monetary exactions. In *San Remo Hotel L.P. v. City & County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004), the Ninth Circuit actually declined to address the landowner's federal takings claim, holding that it was precluded by the state court resolution of the state-law takings claim.[8] The court noted, however, that Ninth Circuit jurisprudence did not apply *Nollan/Dolan* scrutiny to generally applicable monetary exactions "across the board," but that a different rule would be required if the fees had been tailored and individualized. *Id.* at 1097. In fact, the Ninth Circuit made clear in that case that there was no disagreement between itself and the California Supreme Court on this issue. *See id.* ("[T]he California Supreme Court's analysis was thus the equivalent of the approach taken in this circuit.").

Similarly, in *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998), the Ninth Circuit acknowledged that *Nollan/Dolan* scrutiny would be appropriate for an as-applied challenge to monetary exactions, but declined to engage in such close scrutiny as part of a facial challenge to legislation authorizing such exactions. *See id.* at 811 ("If this were an as-applied challenge we would determine the [fee's] effect on each parcel of land. . . . Each as-applied regulatory takings claim must be evaluated independently to

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[8] This Court affirmed the Ninth Circuit's holding in *San Remo Hotel L.P. v. City & County of San Francisco*, 545 U.S. 323 (2005).

determine whether the total exaction is roughly proportional to the harm caused by each development. Because in a facial claim we do not analyze the exactions, *Dolan*'s test for when the exaction costs too much does not apply.").

Finally, petitioners inexplicably rely on *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), for their claim that some courts reject the application of *Nollan/Dolan* to monetary exactions. Not only does that case predate *Dolan*, but the Ninth Circuit actually *applied* a heightened standard equivalent to the *Nollan* standard to the challenged fee in that case. *See id.* at 875 ("[T]he Ordinance does not suffer from the infirmities that the Supreme Court disapproved in *Nollan*. We find that the nexus between the fee provision here at issue . . . and the burdens caused by the commercial development is sufficient to pass constitutional muster.").[9]

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[9] Petitioners' mischaracterization of the holding in *Commercial Builders* might be traceable to a parenthetical in the Ninth Circuit's decision below, in which the court mistakenly claims that the *Commercial Builders* panel rejected the application of *Nollan* to the challenged monetary exaction. *See* Pet. App. 18a. In fact, the Ninth Circuit in *Commercial Builders* rejected an overly strict interpretation of *Nollan* and applied the appropriate essential nexus test to the challenged exaction. *See* 941 F.2d at 875 ("We therefore agree with the City that *Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill in question. Rather, *Nollan* holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld.").

C. This case presents a poor vehicle to address the questions presented.

1. Potentially significant ripeness issues make this case a particularly poor vehicle for reaching the issues on which petitioners seek this Court's review. Claims that a governmental action amounts to an unconstitutional taking without just compensation are subject to the dual ripeness requirements set forth by this Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). Under the first prong of *Williamson County*, the claimant must demonstrate that the government entity charged with implementing the law has reached a final decision regarding the law's applicability to the property at issue. *See id.* at 186. In particular, this prong requires the claimant to pursue administrative measures made available in the regulatory scheme to tailor the facial requirements to the claimant's property. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736-37 (1997). Under the second *Williamson County* prong, the claimant must demonstrate that he or she has sought and been denied just compensation for the taking through the procedures provided by the state for doing so. *See* 473 U.S. at 194. Petitioners' claim is not ripe under either prong.

As an as-applied challenge, petitioners' claim does not satisfy the first prong of the *Williams County* standard.[10] Petitioners originally described their

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[10] Petitioners have vacillated between characterizing their claim as a facial and an as-applied challenge to the City's required stormwater pipe upgrade. *See* Pet. App. 34a ("Plaintiffs originally cast their claims as 'as applied' claims. Plaintiffs later attempt to re-cast their claims as facial or categorical taking claims.") (citations omitted). This is not surprising, as

claim as "as-applied." When it became clear that such a characterization would raise serious jurisdictional ripeness issues, they attempted to re-cast the exact same claim as "facial." The district court saw through this maneuver and evaluated petitioners' takings claim as an "as-applied" challenge to the upgrade requirement. *See* Pet. App. 35a. As noted above, the City Code provides extensive mechanisms by which the generally applicable 12-inch upgrade requirement can be tailored to individual landowners. By failing to pursue these mechanisms, petitioners have failed to ripen their as-applied challenge.

Moreover, petitioners' claims are not ripe under the second prong of *Williamson County*, because they did not pursue their available state-law remedies in the Ninth Circuit. The Washington State Constitution provides that "[n]o private property shall be taken or damaged for public or private use without just compensation having been first made." Wash. Const. art. I, § 16. As the district court noted, "[t]he Washington Supreme Court has established a two-part test applicable to all claims of regulatory takings of property under Article 1, section 16," and this test is distinct from federal takings jurisprudence. Pet.

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petitioners' failure to pursue any available mechanisms to waive or mitigate the financial impact of the required upgrade has placed them on the horns of a dilemma: if they are raising an as-applied challenge to the condition, it is not ripe and therefore Article III courts lack jurisdiction; if they are raising a facial challenge to the ordinance, their takings claim faces an "uphill battle," *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987), and any possible assertion that the lower courts are in conflict evaporates, because the other cases that are purportedly a part of the conflict involve as-applied challenges.

App. 46a ("The inquiry first asks whether the challenged regulation protects the public interest in health, safety, the environment or fiscal integrity. The second inquiry is whether the regulation destroys or derogates any fundamental attribute of ownership . . . .") (citations and internal quotation marks omitted). Petitioners raised a state constitutional challenge to the required upgrade in state court and pursued that challenge in the federal district court after removal. The federal district court ruled against petitioners on the state constitutional issue. *See id.* at 45a-47a. Petitioners did not appeal their state constitutional claim to the Ninth Circuit, however, thereby failing fully to pursue their state-law claim for compensation and depriving this Court of jurisdiction over their federal takings claim.

The Ninth Circuit declined to resolve the ripeness issue, providing this Court with no guidance regarding the proper application of *Williamson County* to the facts of this case. *See* Pet. App. 10a ("Accordingly, we do not resolve whether this claim is ripe under the standards articulated in *Williamson*, and instead assume without deciding that the takings claim is ripe in order to address the merits of the appeal."). Thus, to reach the questions presented in the petition, this Court would have to determine (1) whether petitioners are raising a facial or an as-applied takings challenge; (2) whether the decision rendered by respondent was "final" notwithstanding petitioners' failure to seek a variance, waiver, or other mitigating measures; and (3) whether a state has denied just compensation for a taking when a claimant has received an initial adverse determination from a *federal* court interpreting that state's law and has failed to appeal that decision.

2. Finally, in addition to the impediments posed by the lurking ripeness concerns, this case raises what petitioners themselves concede to be a "more novel question" that "calls for the Court's consideration as a necessary corollary to resolving the first two questions." Pet. 7. This "more novel question" involves the scope and application of the unconstitutional conditions doctrine, and, as petitioners admit, it stands in the way of the Court's reaching the first two questions presented in the petition.

Both the district court and the Ninth Circuit held that petitioners voluntarily agreed to install 24-inch pipe rather than 12-inch pipe in exchange for the waiver of fees and charges associated with petitioners' proposed development in an amount equal to the cost of that upgrade. *See* Pet. App. 19a-21a, 44a-45a. The Ninth Circuit based its holding on a careful consideration of the state law of implied contracts. *See id.* at 19a-21a. Petitioners ask this Court to reverse the Ninth Circuit's application of state law to the facts of this case, and then proceed to resolve an unconstitutional conditions argument that was not addressed by the courts below. *See id.* at 21a, 44a-45a. Moreover, petitioners concede that the Court's interpretation of Washington state law and its resolution of a "novel question" of constitutional law not resolved below is a "necessary corollary to resolving the first two questions." Pet. 7. Petitioners' arguments in this regard are sufficient in their own right to establish that this case is an exceedingly poor vehicle for reaching the questions presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

BRETT C. VINSON
CITY ATTORNEY
1104 Maple Street
Suite 242
Sumner, Washington 98390
(253) 299-5610

MICHAEL C. WALTER
Counsel of Record
KEATING, BUCKLIN &
MCCORMACK, INC., P.S.
800 Fifth Avenue
Suite 4141
Seattle, Washington 98104
(206) 623-8861

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No. 08-1102

In The
Supreme Court of the United States

DANIEL and ANDREA McCLUNG,
Petitioners,

v.

CITY OF SUMNER, WASHINGTON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

WILLIAM C. SEVERSON
Counsel of Record
999 THIRD AVENUE SUITE 3210
SEATTLE, WA 98104-4049
TELEPHONE: (206) 838-4191
FACSIMILE: (206) 838-4193

Counsel for Petitioners Daniel & Andrea McClung

May 18, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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RESPONSE TO THE CITY'S RESTATEMENT OF THE QUESTIONS PRESENTED

The City reformulates the questions presented in terms that dramatize how narrowly the Ninth Circuit interprets *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and why the Court should accept review to clarify and reaffirm its *Nollan / Dolan* jurisprudence.

The City contends that – outside the allegedly special context of required land dedications – *Nollan / Dolan* scrutiny applies *only* to land use exactions that are individually reviewed and tailored through adjudication. *See* City's Opposition, Question Presented. Exactions that are not processed through individualized adjudication are exempt from heightened scrutiny and reviewed only under the deferential multi-factor standards of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), which is to say, they are subject to virtually no scrutiny at all. While the City fairly represents the Ninth Circuit's rule, its restatement reveals clearly just how far the Ninth Circuit has strayed from *Dolan*.

Under the Ninth Circuit's rule, all facial challenges to generally applicable permit regulations are reviewed only under the deferential *Penn Central* analysis because a facial challenge challenges the legislative act itself. The same is true for any other permit requirements that are not subject to modification or tailoring by adjudication. Thus, government can avoid the rigors of *Dolan's* rough proportionality test simply by making the permit exaction mandatory and denying adjudicative review.

To illustrate the operation of such a bizarre rule, suppose that a city required residential permit applicants to replace any play structures at the nearest city park that fall below current standards for quality, condition or performance. Suppose that when the Browns apply for a permit to build a new house, the city requires them to make $50,000 in upgrades to the swings and climbing structures at the nearest park because the equipment no longer meets standards. Assume, too, that this upgrade is wholly disproportionate to the slight increase in park use caused by the Browns' new house. Under the Ninth Circuit's rule, if the City provides the Browns with adjudicative review, *Dolan's* rough proportionality test will kick in, and the disproportional upgrade requirement will be struck down (or what is the same thing, the Browns will receive compensation). However, if no review is authorized, the $50,000 exaction stands because it easily survives the deferential *Penn Central* analysis.[1]

But this result is absurd. How can the validity of an upgrade exaction turn on the availability of adjudicative review? What sense does it make to reward governments with absolution from *Dolan's* rough proportionality requirement if they deny review to permit applicants, but punish governments with the rigor of heightened judicial scrutiny if they do offer relief? How can an upgrade obligation be a compensable taking if the city provides review, but not a taking if the city denies review?

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[1] The same analysis would equally apply, of course, to required upgrades for other public infrastructure, *e.g.*, schools, roads, public safety facilities, utilities, etc.

The nexus and rough proportionality standards of *Nollan / Dolan* provide a principled basis for distinguishing legitimate land use regulations which require developers to internalize the externality costs of their new development, from the illegitimate use of the permit power to extort public benefits. Under *Dolan,* government cannot demand a disproportionate exaction as the price of permit approval. The Ninth Circuit's rule overrides this policy and converts *Dolan's* substantive requirements into an absurd and counter-productive procedural gambit. It allows disproportionate exactions, provided only, that government refuse to offer an adjudicative remedy. This bizarre result conflicts with *Dolan,* with the holdings of other lower courts, and with logic and fairness.

ARGUMENT IN REPLY

A. Other Lower Courts Do Not Generally Agree with the Ninth Circuit's Rule.

The City argues that the lower courts generally agree with the Ninth Circuit's odd reading of *Dolan*. Opp. 7. If that were true, it would make the need for review even more compelling. However, courts and commentators of all stripes agree that Takings jurisprudence continues to be plagued with conflict, confusion and uncertainty.

The Texas Supreme Court's unanimous and well-reasoned decision in *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 135 S.W.3d 620, 641 (2004), stands in stark contrast and direct conflict with the Ninth Circuit's rule. The City attempts to explain away this conflict by asserting that the Texas court

based its decision on the "adjudicative" nature the street upgrade obligation there at issue. Opp. 9. But the opposite is true. The Texas court expressly *rejected* the Ninth Circuit's view that the applicability of *Dolan* depends on whether the exaction is deemed to be "legislative" or "adjudicative."[2] *Flower Mound*, 135 S.W.3d at 641. Instead, the court looked to substance, holding that there was no meaningful distinction between requiring a developer to dedicate land for public pathways and requiring him to upgrade a public street. *Id.*

The City's claim that *Flower Mound* supports its notion that lower courts widely agree with the Ninth Circuit's interpretation of *Dolan* is disingenuous. Even the Ninth Circuit recognized the conflict between its decision and *Flower Mound*. App. 11a.

The City asserts that *Simpson v. City of North Platte*, 292 N.W.2d 297 (Neb. 1980), does not conflict with the Ninth Circuit's rule because *Simpson* predates *Dolan*. Opp. 12. But timing is irrelevant. *Dolan* specifically adopted *Simpson's* "reasonable relationship" standard for evaluating exactions under the federal Takings Clause. *Dolan*, 512 U.S. at 390.

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[2] The difficulties with the legislative/adjudicative formulation are overwhelming. There in not even agreement on what is legislative and what is adjudicative. For example, the Ninth Circuit, itself, has opined in a different context that, "[p]rocessing an individual application pursuant to an established policy is not a legislative function," *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163 (2005), yet here it reached the opposite conclusion. The Texas court rightfully concluded that the legislative/adjudicative labels are not helpful.

Nothing suggests that the Nebraska court has changed its view since *Dolan* was decided.

Simpson directly contradicts the idea that heightened scrutiny only applies to adjudicative decisions. It was a facial challenge to a generally applicable ordinance, yet heightened scrutiny was applied.[3] The same was true in *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page,* 649 N.E.2d 384 (Ill. 1995), a facial constitutional challenge to a legislatively enacted impact fee ordinance. While *Home Builders* was resolved on state constitutional grounds, that was only because the court applied Illinois' more stringent "specific and uniquely attributable" test, rather than *Dolan's* rough proportionality test. The opinion is clear that *Dolan*, not the lax *Penn Central* analysis, would have applied had Illinois' state law test not been more stringent than *Dolan*.

B. The Court Should Make Clear that *Dolan* Applies to Monetary Exactions as Well as Other Forms of Property.

The City argues that this case does not present the issue of whether *Nollan/Dolan* scrutiny applies to monetary exactions because the Ninth Circuit did not address that issue. Opp. 15-20. But this mischaracterizes the Ninth Circuit's decision. Although the Ninth Circuit's primary holding was that

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[3] Simpson did involve a land dedication rather than a monetary exaction, but neither the City nor the Ninth Circuit offers any sensible justification for differentiating between land exactions and monetary exactions.

the stormwater upgrade obligation was a general land use regulation rather than an exaction, the court went on to hold, in the alternative, that, "Even if the upgrade could be viewed as a monetary exaction . . . *Nollan / Dolan* still would not apply. A monetary exaction differs from a land exaction – [u]nlike real or personal property, money is fungible." App. A, 17a (internal quotations and citations omitted). The Ninth Circuit erred in holding that a stormwater upgrade obligation is not an exaction. It was equally wrong in concluding that, because money is fungible, monetary exactions are exempt *per se* from *Nollan / Dolan* scrutiny.

Obviously, not all monetary demands by government require compensation. It is equally true, however, that not all monetary demands are exempt from the compensation requirement. Whether compensation is due depends on the nature of the exaction, not the form of property taken. When government exacts payment for public facilities, it must satisfy the essential constitutional demands for a valid tax, including that it be laid by a non-arbitrary rule of apportionment that treats taxpayers within defined classes uniformly. *Houck v. Little River Drainage Dist.*, 239 U.S. 254 (1915). An exaction, such as that sanctioned by the Ninth Circuit rule, which falls more arbitrarily than the Roman Legions' rule of decimation does not satisfy this standard, regardless of how generally it is applied.[4] A regulation that

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[4] At least decimation followed a regular pattern of selection and carried a uniform consequence. Under the Ninth Circuit's rule, the pattern of selection and the size of the exaction can be entirely serendipitous. It is a rule of generally applicable caprice under which the applicant's burden is determined by the happenstance

requires the permit applicant to make a unique, disproportionate upgrade to public infrastructure is not valid as a tax and not valid as a land use regulation. It is a taking of the applicant's property for public use which requires just compensation. *See Vill. of Norwood v. Baker*, 172 U.S. 269, 278-279 (1898);. *Wight v. Davidson*, 181 U.S. 371, 384-385 (1901).

C. This Case Is an Excellent Vehicle to Address the Application of *Nollan/Dolan* Scrutiny to Public Infrastructure Upgrade Requirements.

The City's final argument against granting the Writ is that "lurking ripeness concerns" and potential difficulties in resolving the Ninth Circuit's misapplication of the unconstitutional conditions doctrine make this "an exceedingly poor vehicle for reaching the questions presented." Opp. 21-24. Nothing could be further from the truth.

1. Ripeness is not an issue.

First, the City's threat of "lurking ripeness concerns" rings hollow. The Ninth Circuit correctly determined that any ripeness concerns are only prudential, not jurisdictional. App. A, 8a-9a. Objections based on prudential ripeness can be waived; and here, the City waived its objections, not just once but twice. It first waived when it removed the case to federal court. That removal would have been improper had further state court proceedings been necessary to

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of what new or improved public facilities are desired when the permit application is submitted.

ripen the federal issues. By seeking removal, the City implicitly represented that the McClungs' federal claim was ripe for consideration, thereby waiving any claim that it was not ripe. *Cf. Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 619 (2002) (state waives Eleventh Amendment immunity by removing case to federal court).[5]

The City waived its ripeness objections a second time at oral argument before the Ninth Circuit. There, to gain the advantage of a favorable determination on the merits, the City expressly stipulated that the McClungs' federal claim was ripe. App. A, 8a, n. 2. The City cannot now reverse course and assert that the McClungs' federal claim is not ripe. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (judicial estoppel bars a party from adopting a position that contradicts a position that it had earlier successfully asserted).

2. The Ninth Circuit's voluntary contract rule would substantially undermine the doctrine of unconstitutional conditions.

The City argues that the Ninth Circuit's voluntary contract holding is well grounded in state law and provides yet another reason to deny certiorari. Opp.

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[5] *See also Key Outdoor Inc. v. City of Galesburg*, 327 F.3d 549, 550 (2003); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 340 n. 22 (2005). If, as *San Remo* indicates, a party waives his right to return to district court if he voluntarily presents his federal claims for decision in state court, so too, a party who chooses to remove a case to federal court based on federal question jurisdiction cannot thereafter claim that the federal question is not ripe for adjudication in federal court.

24. To the contrary, the Ninth Circuit's voluntary contract theory irreconcilably conflicts with the doctrine of unconstitutional conditions. Correcting the Ninth Circuit's clear error is not an impediment to review – it is a further reason why review should be granted.

The unconstitutional conditions doctrine restricts government from exacting a waiver of constitutional right as a condition to the grant of a discretionary benefit. In the land use context, it bars government from exacting property as a condition of permit approval where the exaction would otherwise require just compensation. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 530 (2005). The Ninth Circuit's voluntary contract theory would allow governments to circumvent the unconstitutional conditions doctrine simply by granting a minor permit concession when it imposes the unconstitutional condition. The scheme works like this: Government imposes an unconstitutional permit condition, but in doing so, also includes a minor permit concession. The concession and the unconstitutional condition are then severed (conceptually) from the permit application and become the *quid pro quo* for a separate implied contract in which the concession is exchanged for acceptance of the unconstitutional condition. The unconstitutional permit condition thereby sheds its taint of unconstitutionality because it is transformed into the consideration for a voluntary contract. The best part of this, from the government's view, is that the permit applicant need not expressly agree to the deal or even have the slightest understanding of what is happening. Merely by accepting perforce the permit with the concession and unconstitutional condition included,

the implied bargain is sealed and the unconstitutionality of the condition vanishes.

If allowed to stand, this implied contract theory will undermine the doctrine of unconstitutional conditions. Government need only throw in a little sweetener along with the unconstitutional condition to nullify application of the doctrine. The Court need not shy away from granting review in fear that it will have to correct this debasement of the doctrine of unconstitutional conditions.

D. The City's Restatement of Facts Should Be Disregarded.

The City's "Statement" recasts the substantive and procedural history of this case to suggest that the McClungs improperly slept on their rights; that their paving of the vacated alley significantly increased impervious surface area which exacerbated runoff problems; and that their federal takings claim is no more than an insignificant and belated afterthought, unworthy of this Court's attention. These characterizations are not correct. Moreover, those facts that are faithfully related by the City are irrelevant to the questions presented.

The McClungs did not sleep on their rights. They voiced no objection at the time the permit was issued because they correctly understood that their sole choice was to either comply with the City's demand for a 24-inch pipe or abandon their project. They timely filed their legal action. They did not, as the City claims, delay four years to first raise their federal claim. The Washington Court of Appeals held that the original 1998 complaint and 1999 summary judgment

motion provided the City fair notice of the federal claims under Washington's notice pleading rules, noting that the City's contrary argument "mischaracterized" the complaint and summary judgment. *Tapps Brewing Co. v. City of Sumner*, No. 31959-4 II, 2005 WL 151932 (Wash. Ct. App. Jan. 25, 2005). Nevertheless, when the City removed to federal court it renewed its mischaracterizations (unfortunately to better effect).

The City's claim that "paving the alleyway would ... exacerbat[e] the stormwater runoff" (Opp. 2) is baseless. The alley was already impervious. Sumner Municipal Code ("SMC") § 12.48.200. The large stormwater main the McClungs had to install was grossly disproportional to the minor impact of their development.

Finally, the City suggests that review be denied because the McClungs failed to pursue their administrative remedies: a variance or latecomer agreement. Opp. 10-11, 23. But 42 U.S.C. § 1983 does not require exhaustion of administrative remedies.[6] *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 192 (1985). Moreover, the alleged remedies offered by the City are illusory. As in *Simpson, supra,* Sumner offered variances only in "exceptional circumstances" causing "unnecessary hardship." SMC § 13.48.480. The McClungs' claim of disproportionality did not qualify for such a variance. Nor was a latecomer agreement a viable option. In a

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[6] Under § 1983 the issue is ripeness, not exhaustion of remedies. The City has expressly stipulated that McClungs' federal claim is ripe.

latecomer agreement, the property owner agrees to install a public water or sewer line in a developing area and is repaid by other owners when they, too, develop their property and connect to the line. *See* Wash. Rev. Code § 35.91.020. The City Engineer acknowledged at trial, however, that such an agreement would have been useless for the McClungs because the area served by the storm main at issue was already developed and the other properties were already connected. App. 1, 1a.

The City has shaded the facts to prejudice the reader and mask its inequitable treatment of the McClungs. Putting this innuendo aside, however, the City did not identify *any* misstatements of fact in the Petition for Writ of Certiorari. *See* Supreme Court Rule 15(2). Because the facts stated in the Petition are correct and because the City's counter statement is unnecessary and prejudicial, it should be disregarded.

CONCLUSION

Opinions vary widely on the proper role of government in land use regulation. But even if government is afforded broad powers to regulate land use, that needn't include the power to abuse. The Ninth Circuit rule only clouds the already murky waters of Takings jurisprudence. If the purpose of the Takings Clause is to prevent government from imposing on some the public burdens which, in all fairness and justice, should be borne by the public as a whole, it must require compensation when an owner is arbitrarily selected to pay for general public infrastructure improvements that are not reasonably related to his development's public impacts. *Dolan's* modest effort to constrain unbridled government

discretion with considerations of fairness and efficiency is not an undue burden on government, it is a vital protection of constitutional rights.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM C. SEVERSON
Counsel of Record

999 Third Avenue Suite 3210
Seattle, WA 98104-4049
Telephone: (206) 838-4191
Facsimile: (206) 838-4193

Counsel for Petitioners Daniel & Andrea McClung

APPENDIX

APPENDIX 1

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

No. 98-2-06522-8

[Filed June 17, 2002]

TAPPS BREWING, INC., a Washington corporation, and DANIEL McCLUNG and ANDREA McCLUNG, individually and as a marital community,	)
Plaintiffs,	)
vs.	)
CITY OF SUMNER,	)
Defendant.	)

VERBATIM RECORD OF PROCEEDINGS
June 17, 2002 Tacoma, Washington

* * *

[p.35] [William Shoemaker] "It [the Sumner Municipal Code] speaks about oversizing, the requirement to install it if it's needed, and it gives several methods of financing. One is a latecomers, which didn't seem very appropriate or very likely that Mr. McClung would ever see any money back, [p.36] because it's a developed area . . . ."

* * *

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(2)

No. 08-1102

FILED
APR 1 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

DANIEL and ANDREA McCLUNG,

Petitioners,

v.

CITY OF SUMNER, WASHINGTON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, THE CATO INSTITUTE, AND BUILDING INDUSTRY ASSOCIATION OF WASHINGTON IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
Cato Institute
1000 Massachusetts Ave., NW
Washington, DC 20001
Telephone: (202) 218-4600
Facsimile: (202) 842-3490
Counsel for Amicus Curiae Cato Institute

MERIEM L. HUBBARD
Counsel of Record
BRIAN T. HODGES, *Of Counsel*
LAUREN WIGGINS, *Of Counsel*
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Counsel for Amicus Curiae Pacific Legal Foundation

TIMOTHY HARRIS
Building Industry
Association of Washington
111 21st Avenue SW
Olympia, Washington 98507
Telephone: (360) 352-7800
Facsimile: (360) 352-7801
Counsel for Amicus Curiae
Building Industry Association
of Washington

QUESTIONS PRESENTED

1. May a local government avoid the "nexus" and "rough proportionality" tests of *Nollan* and *Dolan* by imposing development exactions by legislative enactment?

2. May a local government avoid the "nexus" and "rough proportionality" tests of *Nollan* and *Dolan* by imposing development exactions in the form of "impact" fees?

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF), the Cato Institute, and the Building Industry Association of Washington (BIAW) submit this brief amicus curiae in support of Petitioners Daniel and Andrea McClung.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has extensive litigation experience in the area of property rights, having participated as lead counsel or amicus curiae in several takings cases before this Court, including *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF and its supporters, many of whom are property owners, have an interest in the constitutional issues raised in this case. PLF seeks to underscore the need for this Court to address how to properly apply constitutional protections for private property.

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts. This case is of central concern to Cato because it addresses the further collapse of constitutional protections for private property.

The BIAW is a trade association organized under Washington laws. BIAW's more than 12,500 members include corporations, partnerships, and sole proprietors who seek to meet the residential housing needs of Washington's citizens. BIAW's institutional goals include challenging unreasonable land-use regulations which affect property rights and undermine the free-market system.

The opinion below holds that the heightened scrutiny set forth by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), is not applicable to monetary or legislatively imposed exactions. Thus, the lower court's ruling provides that when conditions are attached to the approval of development permits via legislative authorization, there is no requirement for an essential nexus or rough proportionality. The ruling also categorically excludes monetary exactions from heightened scrutiny under *Nollan* and *Dolan*. Amici believe that the Ninth Circuit's ruling is

incorrect and if left unreviewed will severely impact property rights and the availability of affordable housing.

STATEMENT OF THE CASE

The nexus and rough proportionality standards of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), are important constitutional safeguards of private property rights. Together these decisions limit government authority to impose exactions on development that are not qualitatively and quantitatively related to the impact of the proposed development. Since these cases were decided, government entities have expanded the application of exactions to mitigate the impact of development not only on public facilities, but also impacts on public programs such as affordable housing, day care facilities, senior care facilities, and the protection of endangered species.

Local governments impose impact fees as a condition for development approval in order to generate revenue for infrastructure and government programs allegedly necessitated by new development. Approximately 80% of jurisdictions impose impact fees on new development. Duncan Associates, *National Impact Fee Survey: 2008*, at 8 (Oct. 2008).[2] Between 2004 and 2008, the amount of money charged as an impact fee (generally ranging from thousands to tens of thousands of dollars per new housing unit) grew an average of 76%, with some jurisdictions increasing fees up to 225% in that four-year period. *Id.* at 7. In some

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[2] *Available at* http://www.impactfees.com/publications%20pdf/2008_survey.pdf (last visited Mar. 23, 2009).

areas of California, for example, impact fees are estimated to have grown to approximately $80,000 to $90,000 per new home in 2008. Jim Wasserman, *Home Front: Impact Fees May Be the Next Battlefield for Area Builders*, The Sacramento Bee, Dec. 19, 2008, at 8B.[3] Impact fees are so pervasive that they affect nearly every aspect of housing, and have a serious detrimental impact on housing affordability. *See* Theo S. Eicher, *Growth Management, Land Use Regulations, and Housing Prices: Implications for Major Cities in Washington State*, at 10 (Feb. 2008) (estimated cost of regulation and impact fees constitute nearly half the value of Seattle area homes).[4]

Over the past 15 years, state and federal courts have developed a deep conflict regarding whether the exaction of impact fees as a condition on development is subject to nexus and rough proportionality. As a result, governments increasingly rely on impact fees as a vehicle for raising revenue. *See* Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513 (2006) (discussing the marked shift in local government financing from general revenue taxes to "nontax revenue-raising devices" like exactions); Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth With Impact Fees*, 59 SMU L. Rev. 177, 256-57 (2006) (noting the increasing use of development impact fees, and the

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[3] *Available at* http://www.sacbee.com/736/story/1485548.html (last visited Mar. 23, 2009).

[4] *Available at* http://depts.washington.edu/teclass/landuse/Seattle.pdf (last visited Mar. 23, 2009).

split regarding application of *Dolan*'s rough proportionality test to fees).

In this case, the City of Sumner placed a condition on a development permit that required the property owner to pay for and build infrastructure improvements to the city's sewer system. The required improvements cost approximately $50,000. The property owner challenged the impact fee as an unlawful exaction subject to heightened scrutiny under *Nollan / Dolan*. The city argued that its exaction was not subject to the nexus and proportionality tests, because the exaction had been authorized by legislative enactment and only sought payment of money.

The McClungs point out that the exaction in their case involved off-site improvements that had to conform to legislatively adopted standards, but which were individually imposed due to the location and specific nature of the property. *See* McClung Petition for Writ of Certiorari at 3-4, 16-17. But, the Ninth Circuit framed the issue more broadly:

> [W]hether a legislative, generally applicable development condition that does not require the owner to relinquish rights in the real property, as opposed to an adjudicative land-use exaction, should be reviewed pursuant to the ad hoc standards of [*Penn Central Transportation Co. v. City of New York*, 438 U.S. 825 (1987)], or the nexus and rough proportionality standards of [*Nollan* and *Dolan*].

McClung v. City of Sumner, 548 F.3d 1219, 1222 (9th Cir. 2008). Despite recognizing a nationwide split of authority on this issue, the Ninth Circuit concluded

that the exaction was categorically excluded from heightened scrutiny under *Nollan* and *Dolan* because (1) it was legislatively adopted, and (2) the property owner was required to expend money rather than dedicate property. *Id.* at 1226-28.

This case demonstrates how far some courts have strayed from the purpose of the regulatory takings tests established in *Nollan* and *Dolan*, and the need for this Court to clarify the reach of the nexus and rough proportionality tests. The protections of *Nollan* and *Dolan* should not be undermined by artificial distinctions that focus on the manner or form by which property is taken. This Court ought to resolve this conflict by affirming that the Constitution's protections apply to all forms of exactions imposed as conditions on development, whether applied by legislative or adjudicative action, and whether demanded in the form of money or an interest in property.

ARGUMENT

The Fifth Amendment's Takings Clause provides "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. As Justice Harlan recognized over 100 years ago, this fundamental guarantee does not draw any distinction between the manner by which property is taken, or the type of property that is taken:

> The power of the legislature . . . is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go,

> consistently with the citizen's right of property . . . .
>
> In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.

Village of Norwood v. Baker, 172 U.S. 269, 278-79 (1898). Indeed, the purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also* Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 Urb. Law. 487, 488-89 (2006); James L. Huffman, *Colloquium on* Dolan*: The Takings Clause Doctrine of the Supreme Court and the Federal Circuit:* Dolan v. City of Tigard*: Another Step in the Right Direction*, 25 Envtl. L. 143, 152 (1995) ("The takings clause . . . protects against this majoritarian tyranny . . . by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure.").

In *Nollan* and *Dolan*, this Court formulated the two-part essential nexus and rough proportionality test for use in determining whether an exaction constitutes an impermissible taking.[5] First, the court must

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[5] An exaction is a requirement that a property owner provide a benefit to the government in return for receiving permission to use

(continued...)

determine whether there is a connection between the exaction and the impact that would otherwise be caused by the unregulated use of the owner's property. *Nollan*, 483 U.S. at 836-37. If an essential nexus exists, the court must decide whether the required exaction "is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U S. at 391. The burden of proving nexus and proportionality is on government, not the property owner. *Id.* at 391 n.8. Proper application of this burden is essential to prevent government using its permit approval authority to coerce illegal exactions. An exaction that is not supported by nexus and proportionality is "not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Nollan*, 483 U.S. at 837 (citations omitted).

I

THERE IS A SPLIT OF AUTHORITY AMONG STATE AND FEDERAL COURTS THAT MUST BE SETTLED BY THIS COURT

Various state and federal courts interpret *Nollan* and *Dolan* in an inconsistent manner resulting in a nationwide split of authority and confusion about whether the nexus and rough proportionality tests apply to some forms of exactions. The Ninth Circuit's opinion in this case clearly demonstrates the distinctions forming the two major splits: whether the exaction was imposed legislatively or adjudicatively, and whether the exaction requires a dedication of land

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[5] (...continued)
land. Exactions can take any form including dedications of land and cash payments. Haskins, *supra*, at 490-91.

or money. The Ninth Circuit determined that *Nollan* and *Dolan* only apply to adjudicative land-use exactions requiring a landowner to dedicate real property as a condition for permit approval. *McClung*, 548 F.3d at 1226-28. The court concluded that legislative and monetary exactions are categorically excluded from heightened scrutiny under the nexus and rough proportionality tests. *Id.*

A. There Is a Nationwide Split of Authority on Whether *Nollan* and *Dolan* Apply to Legislatively Imposed Exactions

One year after *Dolan*, two members of this Court recognized the burgeoning conflict over whether *Nollan* and *Dolan* should be applied to legislatively imposed exactions.

> It is hardly surprising that some courts have applied *Dolan*'s rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Parking Ass'n of Georgia, Inc. v. City of Atlanta, 515 U.S. 1116, 1117-18 (1995) (Thomas, J., and O'Connor,

J., dissenting from denial of certiorari) ("the lower courts should not have to struggle" with this issue). In the following 14 years, the conflict has only grown deeper, with no resolution in sight. *See* Richard Duane Faus, *Exactions, Impact Fees, and Dedications—Local Government Responses to* Nollan/Dolan *Takings Law Issues*, 29 Stetson L. Rev. 675, 693-701 (2000); (recognizing "nationwide split of authority" on whether *Nollan/Dolan* apply to legislatively enacted impact fees); Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 251 (2000). As demonstrated below, the lower courts continue to struggle with this issue, resulting in inconsistent, conflicting, and confusing decisions.

1. Some Federal and State Courts Apply *Nollan* and *Dolan* to Legislatively Adopted Exactions

One federal circuit court and six state courts of last resort have concluded that *Nollan* and *Dolan* apply to legislatively imposed exactions. In these jurisdictions, the courts generally take an ad hoc, fact-intensive approach to determine whether the exaction constitutes a taking of property, regardless of how the exaction was imposed.

> **First Circuit:** *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995) (*Dolan* applied to a low-income housing impact fee that was imposed by ordinance.).
>
> **Illinois:** *N. Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995) (*Dolan* applied to exaction imposed pursuant to transportation fee ordinance.).

Maine: *Curtis v. Town of S. Thomaston*, 708 A.2d 657, 660 (Me. 1998) (*Dolan* applied to fire protection ordinance requiring developers to construct fire pond.).

New York: *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (*Dolan* applied to rent stabilization ordinance.).

Ohio: *Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 353-56 (Ohio 2000) (*Dolan* applied to impact fee ordinance because there is no reason to distinguish between adjudicative and legislatively imposed exactions.).

Texas: *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 635, 641-42 (Tex. 2004) (*Dolan* applied to impact fee ordinance, refusing to adopt a bright line adjudicative/legislative distinction.).

Washington: *Trimen Dev. Co. v. King County*, 877 P.2d 187, 191 (Wash. 1994) (*Dolan* applied to generally applicable ordinance imposing park development fees.).[6]

2. *McClung* and Seven State Courts of Last Resort Hold That *Nollan* and *Dolan* Do Not Apply to Legislatively Adopted Exactions

Seven state courts of last resort—and now the U.S. Court of Appeals for the Ninth Circuit in

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[6] *But see City of Olympia v. Drebick*, 126 P.3d 802, 810 (Wash. 2006) (distinguishing mitigation impact fees that are subject to *Nollan / Dolan* from general infrastructure fees that are not).

McClung—hold that legislatively imposed exactions are categorically excluded from heightened scrutiny under *Nollan* and *Dolan*.[7] In these jurisdictions, the method by which an exaction is imposed serves as a threshold question, the answer to which decides whether the claim will be reviewed for compliance with the nexus and rough proportionality tests.

> **Arizona:** *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 930 P.2d 993 (Ariz.), *cert. denied*, 521 U.S. 1120 (1997) (*Dolan* does not apply to generally applicable legislative exactions.).
>
> **California:** *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87, 102-04 (Cal. 2002) (*Nollan* and *Dolan* do not apply to legislatively imposed exactions.).
>
> **Colorado:** *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 695-97 (Colo. 2001) (*Nollan* and *Dolan* only apply to cases involving property exactions and discretionary adjudicative determinations specific to one landowner and one parcel of land.).
>
> **Georgia:** *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200, 203 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995) (*Dolan* does not apply because the required exaction was the

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[7] Oregon's Supreme Court has not addressed this issue, but its appellate court recently concluded that *Nollan* and *Dolan* do not apply to legislatively adopted impact fees. *See Rogers Mach., Inc. v. Washington County*, 45 P.3d 966, 979-80 (Or. Ct. App. 2002), *cert. denied*, 538 U.S. 906 (2003) (*Dolan* does not apply to legislatively adopted and generally applicable traffic impact fee.).

result of a legislative determination affecting many landowners.).

Maryland: *Waters Landing Ltd. P'ship v. Montgomery County*, 650 A.2d 712, 724 (Md. 1994) (*Dolan* does not apply to legislatively imposed development impact fees.).

Minnesota: *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 286 (Minn. 1996) (*Dolan* held inapplicable to ordinance requiring that mobile home park owners pay relocation costs for residents.).

North Dakota: *Se. Cass Water Res. Dist. v. Burlington N. R.R. Co.*, 527 N.W.2d 884, 896 (N.D. 1995) (*Dolan* inapplicable to exactions imposed by legislature.).

B. The Ninth Circuit's Decision Creates a Split of Authority Regarding Whether Monetary Exactions Are Categorically Excluded from Review Under *Nollan* and *Dolan*

The decision below also raises the issue whether a monetary exaction can ever be subject to heightened scrutiny under the nexus and rough proportionality tests. A majority of courts have concluded that *Nollan* and *Dolan* apply to an exaction requiring the payment of money. *See, e.g., Schlesinger*, 57 F.3d at 16; *N. Illinois Home Builders Ass'n*, 649 N.E.2d 384; *Beavercreek*, 729 N.E.2d at 353-56; *Town of Flower Mound*, 135 S.W.3d at 641-42; *Trimen*, 877 P.2d at 191. Indeed, several of the state courts that rely on the legislative/adjudicative distinction have held that monetary exactions are subject to the nexus and rough proportionality tests. *See San Remo Hotel*, 41 P.3d at

102 (monetary exaction subject to *Nollan/Dolan* scrutiny); *Krupp*, 19 P.3d at 697-98 (recognizing that some monetary exactions fall within the purview of *Nollan* and *Dolan*).

Until the Ninth Circuit's decision below, only two state courts and one federal circuit court have gone so far as to adopt a bright line rule that monetary exactions can never be subject to the nexus and rough proportionality tests. *See Sea Cabins on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach*, 548 S.E.2d 595, 603 n.5 (S.C. 2001); *McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1579 (10th Cir. 1995). The Ninth Circuit's conclusion that all monetary exactions are categorically excluded from review under *Nollan/Dolan* exacerbates the nationwide split of authority and warrants review by this Court. *McClung*, 548 F.3d at 1227.

II

WHETHER CONSTITUTIONAL TAKINGS STANDARDS APPLY BROADLY IN THE CONTEXT OF DEVELOPMENT EXACTIONS PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW

A. There Is No Basis for Adopting a Rule Excluding All Legislative Exactions from Review Under *Nollan* and *Dolan*

Nollan and *Dolan*'s requirements protect property owners from government actions that target particular individuals arbitrarily and unevenly. *See* Huffman, *supra*, at 152. There is "little doctrinal basis beyond blind deference to legislative decisions to limit [the]

application [of *Dolan*] only to administrative or quasi-judicial acts of government regulators." David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts Are Doing About It*, 28 Stetson L. Rev. 523, 567-68 (1999); *see also* D.S. Pensley, *Real Cities, Ideal Cities: Proposing a Test of Intrinsic Fairness for Contested Development Exactions*, 91 Cornell L. Rev. 699, 704 (2006) (No principled basis exists "for giving greater deference to exactions imposed through legislative enactment than to those imposed through adjudication."). The courts that have elevated the legislative/adjudicative distinction to a threshold test make too much of this distinction, "drawing a bright line where none exists, and none was intended." Haskins, *supra*, at 501.

Indeed, there is no basis for such a distinction in *Nollan* and *Dolan*, which involved mixed legislative and adjudicative government action. The *Nollan* Court noted the Coastal Commission's "public announcement of its intention to condition the rebuilding of houses on the transfer of easements"—a generally applicable quasi-legislative act. 483 U.S. at 833 n.2. Similarly, in *Dolan*, the city acted under a generally applicable and legislatively enacted statute designed to address transportation congestion when it conditioned Ms. Dolan's permit on her dedication of a pedestrian/bicycle pathway. *Dolan*, 512 U.S. at 377-78 (the ordinance "requires that new development facilitate this plan by dedicating land for pedestrian pathways"). In both cases, just as in the present case, the government entity's exaction policy was applied on a uniform and consistent basis. *See, e.g.*, *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d at 483 ("[T]he

Supreme Court refrained from placing any limitations or distinctions or classifications on the application of the 'essential nexus' test."); Callies, *supra*, at 567 (The *Nollan* and *Dolan* decisions involved property dedications, but the nexus and proportionality rules are of more universal application.). The determinative factor present in *Nollan* and *Dolan* was that a government policy was applied to the property owner in a manner that demanded an exaction in exchange for development approval.

As a practical matter, the legislative/adjudicative distinction is neither a meaningful nor viable method for determining whether to apply the nexus and rough proportionality tests. As *Nollan* and *Dolan* demonstrate, it is difficult to classify local government action as solely legislative, administrative, or judicial. Local governments are not structured under strict separation of powers principles, but combine these functions in land-use decision making. *See* Reznik, *supra*, at 257-61. *See also* Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 Ala. L. Rev. 977, 1042 (2000) ("The problem of discerning which statutes are legislative and which are adjudicative for purposes of a *Dolan* analysis is apt to be open-ended and chronic."). Predictably, the most comprehensive article on the problems encountered when attempting to distinguish legislative from adjudicative land use decisions found a general confusion and inconsistency about how to characterize government action. Reznik, *supra*, at 252-56.

Because states and municipalities vary in how land use decisions are processed, reliance on a legislative/adjudicative distinction as a touchstone for whether heightened scrutiny will apply only

guarantees continued unequal treatment of citizens under the Takings Clause. This Court should take the opportunity to reaffirm that the fundamental guarantee of the Takings Clause focuses on the impact of an action on property—not the type of government action used to take the property.

B. There Is No Basis for Adopting a Rule Limiting *Nollan* and *Dolan* to Exactions of Real Property

The courts that categorically exclude monetary exactions from scrutiny under *Nollan* and *Dolan* rely on *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. at 702, for the proposition that this Court expressly limited the appellation of *Dolan* to exactions of real property. *See McClung*, 548 F.3d at 1227; *Sea Cabins*, 548 S.E.2d at 603 n.5. But there is no basis in *Del Monte Dunes* for adopting a bright line rule limiting *Nollan* and *Dolan* to exactions of real property. *See* J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go From Here*, 59 Wash. & Lee L. Rev. 373, 397-401 (2002).

In *Del Monte Dunes*, this Court explained that *Dolan* "was not designed to address, and is not readily applicable to . . . [a situation where] the landowner's challenge is *based not on excessive exactions but on denial of development*." 526 U.S. at 703 (emphasis added). The limitation in that case was not meant to limit *Dolan*'s application to conditions on development, but rather prevent application of *Dolan* to the denial of a permit. The denial of a permit does not involve conditions on development. *See* Breemer, *supra*, at 400. Read in its proper context, *Del Monte Dunes* does

not impose a bright line rule limiting the factual circumstances in which a property owner can invoke the protections of the Takings Clause.

To the contrary, the *Del Monte Dunes* Court reiterated that takings cases rely on complex factual assessments concerning the impacts and purposes of government actions. *Del Monte Dunes*, 526 U.S. at 720 (quoting *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992)). Applying this standard, several state courts conclude that an impact fee should be reviewed subject to *Nollan* and *Dolan*. *See, e.g.*, *Town of Flower Mound*, 135 S.W.3d at 641 ("[W]e can find no meaningful distinction between the condition imposed on Stafford and the conditions imposed on Dolan and the Nollans. All were based on general authority taking into account individual circumstances."); *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. Ct. App. 1996) ("[W]e reject the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions. When such exactions are imposed . . . on an individual and discretionary basis, we conclude that the heightened standard of judicial scrutiny of *Nollan* and *Dolan* is triggered."); *Dudek v. Umatilla County*, 69 P.3d 751, 758 (Or. Ct. App. 2003) (Holding that a monetary exaction requiring the property owner to purchase a 10-foot easement on the neighboring lot for a public purpose was the equivalent of a dedication of land.).

C. Reliance on Legislative/Adjudicative and Monetary/Possessory Distinctions Does Nothing To Protect Property Owners from the Risk of Government Coercion

Nollan and *Dolan*'s close nexus and rough proportionality tests are meant to prevent coercive and unfair government behavior when a property owner seeks government's permission to use property in a particular way. *Nollan*, 483 U.S. at 837; *see, e.g.*, *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d at 481, 483 (Rent stabilization ordinance unconstitutional because it placed an "indeterminate and unjustifiable burden draped disproportionately on the particular owners' shoulders."). Courts limiting the application of *Nollan* and *Dolan* to purely adjudicative exactions, on the other hand, reason that the risk of government extortion is lessened in the legislative process. *See San Remo Hotel*, 41 P.3d at 102-04.

But the risk of coercive or unfair government behavior is not obviated when an exaction is imposed legislatively as opposed to adjudicatively, or when an exaction is imposed in the form of money rather than land. *See* Ball & Reynolds, *supra*, at 1518; Breemer, *supra*, at 397-98. To the contrary, "[t]he extortion and inequitable economic burdens that local governments potentially impose on landowners through administrative processes can occur just as easily in the legislative context." Reznik, *supra*, at 267. As the Texas Supreme Court recently noted, without *Nollan* and *Dolan* as a check on their power, government officials are free to "'gang up' on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as the burdens

they would otherwise bear were shifted to others." *Town of Flower Mound*, 135 S.W.3d at 641. Grossly disproportionate exactions are extremely likely to result from broadly applicable, generalized exaction programs. *See Citizens' Alliance for Property Rights v. Sims*, 187 P.3d 786, 796 (Wash. Ct. App. 2008) (invalidating legislatively adopted ordinance that imposed a preset exaction on all rural property owners, but did not impose a similar exaction on majority of County's property owners); *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 390 (Ill. App. Ct. 1996) ("Certainly, a municipality should not be able to insulate itself from a taking challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property."); Reznik, *supra*, at 271-72; and William S. Fischel, *Utilitarian Balancing and Formalism in Takings*, 88 Colum. L. Rev. 1581, 1582 (1988).

The over-reliance on arbitrary distinctions undermines the holdings of *Nollan* and *Dolan*, and provides government with a gaping loophole whereby it can escape heightened scrutiny by simply converting individualized exactions of property into legislatively imposed fees. A predictable and broad based application of *Nollan* and *Dolan* would benefit both property owners and government. Artificial distinctions do not further the Takings Clause's substantive protection of private property.

CONCLUSION

The standard of review in a constitutional takings claim should be uniform across this nation's courts and must not depend on ill-defined distinctions like the

manner by which an exaction is imposed. Allowing excessive development exactions to escape the *Nollan/Dolan* nexus and rough proportionality standards effectively vitiates the Fifth Amendment in those cases.

Amici respectfully request that this Court grant certiorari to resolve the important issues raised by the Ninth Circuit's decision in this case.

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Respectfully submitted,

ILYA SHAPIRO
Cato Institute
1000 Massachusetts Ave., NW
Washington, DC 20001
Telephone: (202) 218-4600
Facsimile: (202) 842-3490
Counsel for Amicus Curiae Cato Institute

TIMOTHY HARRIS
Building Industry Association of Washington
111 21st Avenue SW
Olympia, Washington 98507
Telephone: (360) 352-7800
Facsimile: (360) 352-7801
Counsel for Amicus Curiae Building Industry Association of Washington

MERIEM L. HUBBARD
Counsel of Record
BRIAN T. HODGES, *Of Counsel*
LAUREN WIGGINS, *Of Counsel*
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Counsel for Amicus Curiae Pacific Legal Foundation